A TREATISE ON THE Rules and Practice OF THE EQUITY SIDE OF THE EXCHEQUER in *IRELAND*;

WITH THE

Several STATUTES relative thereto.

AS ALSO

Several Adjudged Cases on the Practice in Courts of EQUITY, both in *England* and *Ireland*, with the Reasons and Origin thereof in many Instances as they arose from the Civil Law of the *Romans*, or the Canon and Feudal Laws;

BRITANNICUM

And a

Compleat Index to the whole.

VOL. II.

This Work is with all Deference most humbly inscribed to the Right Honourable and Honourable, the *Chancellor*, *Treasurer*, *Lord Chief Baron*, and the rest of the *Barons* of the Court of *Exchequer*, by their

most devoted and
most obedient
humble Servant,
GORGES EDMOND HOWARD.

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BRITANNICVM

A TREATISE ON THE Rules *and* Practice OF THE EQUITY SIDE OF THE EXCHEQUER in *IRELAND*, &c.

Feme Covert.

Feme Covert.

FEME COVERTS are married Women; and Husband and Wife, must join in Suit for Things meerly in Action, belonging to the Wife. 1 *Ch. Ca.* 41.

In what Cases she may sue separate from her Husband.

But sometimes the Wife by her *Prochein Amy*, or next Friend, sues her Husband in this Court, as where she sues him

him for Performance of a Marriage Settlement, or the like. And ſometimes ſhe petitions againſt him, or ſues him here for Alimony, as where he turns her away, or where ſhe goes away upon ill Uſage: Alſo a *Feme Covert* hath been allowed to ſue in her own Name, when her Huſband was beyond Sea: So in Caſe where a Huſband releaſed his Wife's Debt.

Ibidem. A *Feme Covert*, who has a ſeparate Maintenance, may ſue alone; ſo may a Wife whoſe Huſband is baniſhed by Act of Parliament, and may act in every Thing as a *Feme Sole*. 1 *Ch. Ca.* 35. 2 *Vern.* 104.

The Wife refuſing to anſwer, the Bill can be taken *pro confeſſo*, againſt the Huſband only. So if the Wife refuſes to join in a Plea, it ſhall ſtand as for the Huſband only.

If the Wife anſwers, and the Huſband ſtands out all Proceſs of Contempt, the Bill can be taken *pro confeſſo*, againſt the Huſband only. So where a Wife by Combination refuſed to join with her Huſband in a Plea, the Plea was ordered to ſtand as for the Huſband, and the Plaintiff to proceed againſt the Wife. 1 *Ch. Ca.* 296. 2 *Ch. Ca.* 173.

A *Feme Covert* muſt Anſwer alone; if Huſband be not amenable.

A *Feme Covert* muſt anſwer alone, if the Huſband is not amenable, or an Attachment will be granted againſt her. 2 *Vern.* 613.

Though

Though the Wife's Anſwer differs from the Huſband's, yet it ſhall not prejudice him, for ſhe can be no Witneſs againſt him. 2 *Vern.* 79.

Wife's Anſwer different from the Huſband, ſhall not prejudice him.

Where a Wife is Defendant, you cannot regularly ſerve the Wife with Proceſs to Anſwer, without ſerving the Huſband alſo, though the Matter in Queſtion concerns the Wife only.

Though the Matter only concerns the Wife, yet both muſt be ſerved with Proceſs.

But frequently the Wife is put to anſwer alone, when the Huſband is beyond Sea; but there muſt be an Order obtained for the Wife to put in and ſwear her Anſwer ſeparate from her Huſband, which the Court will grant upon Counſel's Motion. So where ſhe lives ſeparate from her Huſband, ſhe is often ordered to anſwer alone; but if ſhe anſwers alone, without Leave of the Court, the Anſwer will be ſuppreſſed upon Motion. 1 *Ch. Rep.* 68.

Where a Wife anſwers ſeparate from her Huſband, there muſt be an Order for that Purpoſe.

For more on this Subject, ſee *Title Anſwers*, &c.

Fines on Sheriffs.

RULE. Fines impoſed, not to be taken off, but on Cauſe ſhewn and Coſts paid.

BY the 72d general Rule, no Fines upon the Averment are to be taken off, but upon Certificate of the Attorney, that the Coſts of impoſing ſuch Fines are paid, and good Cauſe appearing to the Court, for taking off ſuch Fines.

RULE. Attachment to the Purſuivant againſt a Sheriff, after two Fines are impoſed in all Caſes.

By the 73d general Rule, where a Sheriff doth not bring in the Defendant's Body upon a *Cepi*, or bring in Money according to his Return, or doth not return his Writ or Proceſs, Affidavit being filed of the Delivery thereof, that in all ſuch Caſes, after two Fines are impoſed by the Court, an Attachment to the Purſuivant ſhall iſſue of courſe, firſt taking out an Order for the ſame, which is to mention the ſaid reſpective Fines and the Time of entring each Rule.

RULE. Fines impoſed on Sheriffs, for not returning Writs, not to be reduced, but on good Cauſe ſhewn by Affidavit.

On the 28th of *November* 1752, it was ordered as a general Rule, that for the future, no Fines impoſed on Sheriffs for not returning Writs directed to them, ſhall be reduced, unleſs an Affidavit be produced aſſigning a ſufficient Cauſe wherefore they delayed returning the ſame.

Hearing.

Hearing.

AFTER Publication had paſſed at the Civil Law, the laſt Act, *quoad* the Proof, was the *Concluſio Cauſæ*, which was concluding in Fact, and there was an Inſtance of either Party to the Judge, that either Party ſhould renounce all further Proof, and if the Party did renounce the Proof, there was a Concluſion; but if he did not ſhew any Cauſe why he ſhould not, for his Contumacy in not renouncing, the Concluſion was taken *pro confeſſo*: But this is not of the Eſſence of the Proceſs; *Concluſio non eſt de Subſtantia, ſed potius ex quadam Conſuetudine, unde ſi obmittatur non vitiat Proceſſum; tantum magis in Cauſis ſummariis in quibus de Neceſſitate non requiritur. Vide*, Gail, 189. *Marant.* 148. 427. The Method of hearing Cauſes at the Civil Law.

And after the Concluſion in the Cauſe, they moved, or petitioned the Judge to ſet down the Cauſe to be heard, which they called *ad allegandum in Jure*; and then there was a Citation to the Defendant to appear at that Day, and upon Proof of the Service of that Citation, and reading his Anſwer, and Proofs in the Cauſe, if he did not appear, the Advocate for the Plaintiff firſt argued, Ibidem.

and then the Advocate for the Defendant, and thereupon Sentence was given. *Ibidem.*

And in Courts of Equity.

But in Courts of Equity there is no ſuch Proceeding as the *Concluſio Cauſæ*; for as ſoon as Publication is paſſed, the Court, upon Application of the Plaintiff, will appoint a Day *ad audiendam Sententiam.*

And Hearings are on,

The ſeveral ſorts of Hearings.

Firſt, Bill, Anſwer, Pleadings and Proofs.

Second, Bill, Anſwer, and Pleadings, without Proofs.

Third, Bill and Anſwer.

Fourth, Bill to be taken *pro confeſſo.*

Fifth, On the Officer's Report, and the Merits, where an Account has been decreed, which ſee under *Title Account.*

Sixth, On the Verdict and Merits, where an Iſſue has been directed at Law, which ſee, under *Title Orders.*

Seventh, Hearing, *ad Requiſitionem Defendentis.*

And, Firſt, Of Hearing, on Bill, Anſwer, Pleading and Proofs.

RULE. Publication of the Depoſitions.

By the 45th general Rule, when Witneſſes are examined, the firſt Rule for Publication is to be moved of courſe by

by an Attorney, without Notice; and upon this Motion, the Court will grant a conditional Order to ſhew Cauſe, in four Days, why Publication ſhould not be granted, and an atteſted Copy of this Order is to be ſerved on the adverſe Attorney; and when the Time for ſhewing Cauſe is expired, the Court, upon an Attorney's Motion, and upon producing the laſt Order, an Affidavit of the Service thereof, and a Certificate of no Cauſe being ſhewn why Publication ſhould not paſs, will make the Rule for Publication abſolute.

And Publication where the Plaintiff only examines.

So likewiſe, when the Plaintiff hath finiſhed his Examination either by Commiſſion or in Town, and when the Defendant hath let a Vacation paſs without examining any Witneſſes on his Side, the Plaintiff's Attorney may, on the firſt Day of the next Term, after ſuch Vacation, move the firſt Rule for Publication, and proceed to make it abſolute, as above: But note, the ſhort Vacation after *Eaſter* Term, is never accounted a Vacation to examine in.

Of the ſetting down the Cauſe to be heard, and ſerving *Subpœna* to hear Judgment.

And when Publication is paſſed, if it be before, or on the Eſſoin Day of Term, the Plaintiff's Attorney may move, to have the Cauſe ſet down to be heard, on ſome Day in Term; or if Publication be paſſed after the Eſſoin Day, then in the Sittings after the Term; and the Court

Court will make an Order for that Purpoſe, which Order is to be ſerved on the oppoſite Attorney, four Days before the Day appointed for the Hearing, excluſive of the Day on which it is ſerved; and when the Day of Hearing is appointed, the Plaintiff's Attorney is to give a Note of the Cauſe, to the Chief Remembrancer, with a brief Account of the Nature of it; and then (unleſs there be an Order on the Defendant, to appear *gratis*,) he is to take out a *Subpœna ad audiendum Judicium*, returnable at a Day certain, which is to be ſerved eight Days before the Day of Hearing. For the Manner of Service, See *Title Proceſs*.

Ibidem. If there be ſuch an Order on the Defendant to appear *gratis*, then the Defendant's Attorney is to be ſerved with the Order for Hearing only.

The *Subpœna* to hear Judgment, is according to the Notion of the Civil Law. And this Citation to hear Judgment, is made according to the Notion of the Civil Law, that no Act of Court may be made; *parte inaudita altera* and the Service is made eight Days before the Day appointed for Hearing, that the Party may have Time to take out the Depoſitions, and prepare his Counſel.

Hearing. When the Day of Hearing is come, if the Plaintiff and Defendant attend, the Plaintiff's Counſel is firſt to open the Bill, and a Counſel for the Defendant opens

opens his Anſwer; then the Caſe on both Sides is to be ſtated and argued; and thereupon, and upon reading the Proofs, the Court proceed to give Judgment.

Order of the Day to be produced on the Hearing.

But note, that no Cauſe will be admitted to be brought to Hearing, unleſs the Order for ſetting the ſame down, called the Order for the Day, be taken out, and produced to the Court.

Other Orders which may be requiſite to be produced on the Hearing.

There may alſo be ſeveral other Orders conceived, in the Progreſs of the Cauſe, which are requiſite to be produced on the Hearing, and without which, the Court in ſome Caſes will not proceed: As Orders to revive, where there has been an Abatement; for ſtriking Parties out of the Bill; that the Defendant ſhall appear *gratis*, upon the Hearing; for taking the Anſwer of a *Feme Covert*, ſeparate from her Huſband; for appointing a Guardian for a Minor, to appear and anſwer for him; Orders on Conſents, for reading Deeds, *&c.* on the Hearing as proved; for ſuffering no conditional Decree; and ſuch like: Which an Attorney or Agent, muſt be eſpecially careful to have ready to produce to the Court, as they ſhall be needed. If he duly makes his Entries, in his Books, or regularly keeps his Bills of Coſt, they will be of great Uſe to him upon this Occaſion.

The

Method of ſetting down Cauſes to be heard.

The Method of ſetting down Cauſes now, is not according to the Priority of Publication, as it was formerly: For now, before the beginning of each Term, the Chief Remembrancer enters in the Book of Notes, all the Cauſes unheard the precedent Term.

Ibidem.

And the Attornies in the Vacation, give the Officer a Note of all the Cauſes for the enſuing Term, with a brief Account of the Nature of each Cauſe; which being entered after the adjourned Cauſes, the Officer makes a Liſt of them, which is delivered to the Judges, and after the Liſt is prepared, no Cauſe is admitted to be after ſet down for that Term.

Second. *Of Hearing upon Bill, Anſwer and Pleadings without Proofs.*

Hearing on Bill and Anſwer, the Anſwer to be taken as true in all Points.

IN many Caſes, though the Cauſe requires no Witneſſes to be examined, yet it may be neceſſary for the Plaintiff to reply, whereby the Defendant will be put upon Proof of his Anſwer, and the Plaintiff admitted to prove the Matters of his Bill; for ſhould the Cauſe be heard upon Bill and Anſwer, the Plaintiff muſt take the Defendant's Anſwer, to

to be true in all Points. And if the Plaintiff replies to an Anſwer, and without Re-joinder, or Rules, brings the Cauſe to a Hearing, the Anſwer ſhall be taken to be wholly true, as if there had been no Replication; for the Opportunity which the Defendant had of proving his Anſwer, is taken from him. See 2 *Chan. Ca.* 21. See the Rule, P. 401.

Subpœna to rejoin not ſerved, though ſued out, yet Cauſe may be heard on Bill and Anſwer.

And if the *Subpœnâ* to rejoin, be not ſerved, *&c.* though it be ſued out, the the Cauſe may be heard, on Bill and Anſwer.

How the Plaintiff is to proceed to Hearing, on the Pleadings where he hath no Witneſſes to examine, in Caſe the Defendant does or does not re-join.

Where a Plaintiff hath reply'd, and would have the Cauſe heard upon the Pleadings, he may forthwith ſerve the Defendant with a *Subpœna* to rejoin, and upon Affidavit of the Service thereof, and upon Motion of his Attorney thereon, he may obtain an Order for the Defendant to re-join in four Days: And whether the Defendant does, or does not rejoin, the Plaintiff's Attorney may move of Courſe, and without an Affidavit of the Service of the Rule to re-join, that the Defendant may examine his Witneſſes, the following Vacation, or that the Cauſe may be heard in the next Term, on the Pleadings, and the Court will grant ſuch an Order, and this Order is to be forthwith ſerved upon the Defendant's Attorney; and if the Defendant examines no Witneſſes, the Plain-

Plaintiff's Attorney may, the next Term, on Affidavit of the Service of the ſaid Order, and on Motion thereon, obtain an Order, for ſetting down the Cauſe, to be heard on ſome Day in the Term, if this Motion be made on the Eſſoin Day, if afterwards, in the Sittings after Term, or in ſome Day in the next Term.

And where the Defendant is to re-join *gratis*.

But if the Defendant be under an Obligation to re-join *gratis*, the Plaintiff need not in this Caſe ſerve the Defendant with a *Subpœna* to re-join, but may immediately when he has reply'd, put a Rule on the Defendant to examine his Witneſſes as aforeſaid.

If the Defendant examines, Plaintiff to proceed to Hearing as aforeſaid.

If Witneſſes be examined by the Defendant, the Plaintiff may after Publication of the Depoſitions, ſet down the Cauſe for Hearing as is before directed.

Cauſe heard as to ſome of the Defendants upon the Pleadings, and as to the others on the Pleadings and Proofs.

Where there are ſeveral Defendants in a Cauſe, and that the Plaintiff is not inclined to examine Witneſſes, as to ſome of them, but to hear the Cauſe as to thoſe upon the Pleadings, in this Caſe, a Motion is to be made by the Plaintiff's Attorney, that the Cauſe may be heard as to ſuch Defendants, upon the Pleadings; at the ſame Time that it is heard againſt the other Defendants, upon the Pleadings and Proofs.

If

By the 47th general Rule, If in any Cauſe, the Plaintiff ſhall proceed to examine Witneſſes, and ſhall prove no more than what is confeſſed by Anſwer, ſo that he might have gone to Hearing on the Pleadings, in that Caſe, although he obtain a Decree, yet he ſhall pay the Defendant the Coſts expended after his Anſwer.

RULE, 47th. Witneſſes examined and no more proved than is confeſſed by the Anſwer, Plaintiff to pay the Coſts after Anſwer, though he obtain a Decree.

Third. *Of Hearing upon Bill and Anſwer.*

WHEN the Plaintiff finds ſufficient Matter of Equity confeſſed in the Defendant's Anſwer, whereupon to ground a Decree without further Proof, he may proceed to ſet down the Cauſe for Hearing upon Bill and Anſwer, and without puting any Rule upon the Defendant to Examine.

Hearing upon Bill and Anſwer where ſufficient Equity is confeſſed.

And after the Plaintiff hath filed a Replication, if he be inclined to have the Cauſe heard upon the Bill and Anſwer, the Court, upon Motion of the Plaintiff's Attorney, will give leave to withdraw

Replication may be withdrawn and the Cauſe heardon Bill and Anſwer.

withdraw the Replication, and proceed to Hearing on the Bill and Anſwer.

RULE 48. Hearing on Bill and Anſwer, the Anſwer to be taken as true in all Points.

By the 48th general Rule, if a Hearing be prayed on Bill and Anſwer, the Anſwer muſt be admitted to be true in all Points, and no other Evidence admitted, unleſs it be matter of Record, to which the Anſwer particularly refers, and is provable by the Record: But in Caſe the Court ſhall find no Ground for giving the Decree thereon, the Bill is to be diſmiſſed with Coſts, or the Plaintiff, (if he deſires it) may be admitted to Reply, he firſt giving the Defendant, or his Attorney, forty Shillings Coſts; which if he pays not within four Days after Hearing, then the Diſmiſs is to ſtand, and the Order is to be entered and taken out accordingly.

And if no Decree can be given thereon, the Bill is to be diſmiſſed with Coſts or Plaintiff may reply, firſt paying forty Shillings Coſts.

No Deed to be read on the Hearing, unleſs Iſſue be joined.

It is ſaid, that no Deed will be admitted to be read on the Hearing in any Cauſe, where Iſſue is not joined.

Upon a Demurrer at the Hearing for Want of Parties, or Plea of Outlawry, How the Plaintiff is to bring the Cauſe on again, and what Coſt he is to pay.

Upon a Demurrer at the Hearing for Want of Parties, if it be allowed, the Court will order the Cauſe to ſtand over, with Liberty for the Plaintiff to amend his Bill, and that he ſhall pay the Coſt of the Day. And in all Caſes, where the Cauſe ſtands over for want of Parties, when the Plaintiff hath amended his Bill, and that the Party who

who was added hath anſwered, and the Plaintiff hath paid the Coſts of the Day, and hath proceeded upon the Amendment as to the other Defendants, as is uſual on amending Bills, his Attorney may then (without producing the laſt Order) move of Courſe, for Liberty to ſet down the Cauſe, to be heard on Bill and Anſwer, as to the new-added Defendants, and to be further heard as to the former Defendants, and the Court will make an Order for that Purpoſe; and the Plaintiff is to ſerve the Order on the former Parties, four Days before the Day appointed for the Hearing, and excluſive of the Day of Service, and is to ſerve the added parties with *Subpœna to hear Judgment*, and may then proceed to Hearing as uſual. *Sed Vide Moſeley's Rep.* 226; where it is ſaid, the former Defendants muſt be alſo ſerved with *Subpœna*, to hear Judgment.

If there be a Replication and Rejoinder, or Proofs in the Cauſe, the Order muſt be, that the Cauſe ſhall be further heard againſt the other Defendants on the Pleadings, or on the Pleadings and Proofs, as the Caſe is.

How to proceed after the outlawry reverſed.

As alſo upon a Plea of Outlawry at the Hearing, after the Plaintiff hath reverſed the Outlawry, and paid the Coſts

of the Day, he may move by his Attorney, to ſet down the Cauſe to be further heard, and proceed as uſual.

The Coſts to be paid in either Caſe.

And in either of theſe Caſes, the Coſts to be paid by the Plaintiff, are the ſame as upon Diſmiſſes, for not appearing on the Hearing. See Pa. 393. *Title Diſmiſs.*

The Court on want of Parties, may either diſmiſs the Bill without prejudice or, give Leave to amend.

Where a Bill wants proper Parties, it is in the power of the Court to diſmiſs the Bill without Prejudice, or to give leave to amend, paying Coſts. 1 *Williams*, 428.

Fourth. *Of Hearings upon Bills to be taken* pro confeſſo.

The Method of proceeding at the Civil Law, to take the Libel as confeſſed, where the Defendant or *Reus* did not anſwer it.

IT has been already ſaid, that according to the ancient Civil Law, when the Libel was preferred to the Judge, it was alſo delivered to the Defendant or *Reus*, and if he did not anſwer in ten Days they had the *Edictum primum*, and after ten Days more, if the Anſwer did not come in, they had the *Edictum ſecundum*, and in ten Days more, they had the *Edictum peremptorium*: And if he did not come in and anſwer in ten days more, Judgment was pronounced

nounced upon him, as if he was abſent; and theſe were called the ſeveral *Dilationes* that were given the Defendant to anſwer: But after the provincial Judges were ſettled, then came in the Code to a new Regulation, which was, that after the Defendant was cited, the Plaintiff was to give Caution to end his Suit in two Months, and then he was likewiſe to deliver a Copy of the Libel to the *Reus*, who ſubſcribed the Note of the Time when ſuch Libel was delivered, and then there was a Term of twenty Days given the Defendant, in which Time he was to put in his Anſwer; and if he did not, Sentence was given as if the Anſwer was put in; for they looked upon the ſubſcribing the Time of receiving the Libel, as a Submiſſion to conteſt within the twenty Days, and the twenty Days were reckoned as a Time of Deliberation, whether he would yield to his Adverſary, or contend in Judgment; and therefore if the Libel was delivered, and the Subſcription demanded, and the Actor proved this, and the twenty Days were out, then the Defendant was preſumed to acquieſce. *De Judiciis, Lib.* 5. *tit.* 1 *Law.* 72. *Code Lib.* 3. *Tit.* 9 *Verb aufertur, Novel.* 53. *Cap.* 3.

And by *Maranta*'s Practice of the Civil, and Canon Law, 262; the Defendant, for refuſing to anſwer before

And how the Sentence was expreſſed.

the Judge, was deemed contumacious, and his Puniſhment is thus expreſſed: *Vigeſima pœna eſt quia Contumacia qui non vult reſpondere coram Judice habetur pro negante vel confitente ſecundum quod eſt ei magis Præjudicium.*

The Proceedings much the ſame in Courts of Equity, and in what Caſe the Cauſe ſhall be ſet down to be heard to have the Bill taken as confeſſed.

So in this Court, where a Perſon is ſerved with a *Subpœna*, and appears thereupon, but neglects to anſwer, and Proceſs iſſues againſt him to a Sequeſtration, the Plaintiff's Attorney may, upon Motion to the Court, upon the Sequeſtration and Return, obtain an Order for ſetting down the Cauſe to be heard, to have the Bill taken *pro confeſſo:* And if the Defendant neglects to appear, the Plaintiff's Attorney may in like Manner ſet down the Cauſe, and by a late Statute the Court will appoint an Attorney to appear for the Defendant See Pa. 491.

The Plaintiff in this Caſe need not ſerve a *Subpœna* to hear Judgment.

And in this Caſe, there is no occaſion to ſerve either the Party, or his Houſe, or laſt Place of abode with a *Subpœna* to hear Judgment, in regard the Party is in Contempt, and it being returned upon the Proceſs, That the Defendant is not to be found, and upon the Sequeſtration that he hath no Goods, he is ſuppoſed not to be found any where, ſo as to be ſerved with a *Subpœna* to hear Judgment.

The

The Practice of taking Bills *pro confeſſo* is not of long ſtanding, the antient Way being to put the Plaintiff to make Proof of the Subſtance of the Bill by Witneſſes *viva Voce*, although the Defendant had ſtood out to the laſt Proceſs, a Sequeſtration: And ſo every Plaintiff at Law was put to prove his Declaration, as appears by theſe Words *Et inde producit Sectam*, where *Secta* ſignifies the Witneſſes. 1 *Vern.* 224. *Moſeley's Rep.* 386.

This Practice not of long ſtanding.

The Plaintiff's Bill formerly proved by Witneſſes *viva Voce*.

But this Practice was diſuſed, becauſe the Plaintiff often comes into Equity, becauſe he cannot prove his Caſe, but by the Diſcovery of the Defendant. *Ibidem.* But then the Bill was read in open Court, leſt an inconſiſtent Decree ſhould be paſſed.

Why diſuſed.

In 1 *Vern.* 247. *Gibſon* againſt *Scevengton*, the Court appeared to be in doubt, whether it ſhould grant ſuch an Order, for that the Conſequence of it is extraordinary, to take every Thing for granted, which the fruitful Fancy of a Counſel could invent, or put into a Bill and make all paſs for Truth.

The Conſequences of the preſent Order to the Defendant.

The Reaſon of this Order muſt be, that the Defendant appearing, and refuſing to put in any Anſwer at all, the Plaintiff is by that Means rendered in-

The Reaſon of the Order.

capable of joining Iſſue, and deprived of the Opportunity of examining any Witneſſes. 2 *Williams*, 558. *Hawkins* againſt *Crook*.

Analogous to a Judgment at Law by *nihil dicit*.

And this Method of taking a Bill *pro confeſſo*, is conſonant alſo to the Rules and Practice of Courts at Law, where, if the Defendant makes Default by *nihil dicit*, Judgment is immediately given in Debt, or in all Caſes where the Thing demanded is certain; but where the Matter ſued for, conſiſts in Damages, a Judgment interlocutory is given, after which a Writ of Enquiry goes to aſcertain the Damages, and then follows Judgment final. *Ibidem.*

Formerly a Bill could not be taken *pro confeſſo*, where the Defendant had Time to anſwer, though the Anſwer was Reported ſhort.

And in the above mentioned Caſe of *Hawkins* and *Crook*, on an Appeal to the Lord Chancellor *King*, from the Maſter of the Rolls, it was determined, That as Time was given the Defendant to anſwer, though after a Sequeſtration, and though the Anſwer was reported ſhort, yet the Bill could not be preſumed to be true for Want of an Anſwer, when by the Records of the Court there appeared to be an Anſwer, (and admitted by the Plaintiff by his taking Exceptions) and when ſeveral material Parts of the Bill were denied by the Anſwer. 2 *Williams* 556. *Moſeley's Rep.* 389. But the Practice now is quite otherwiſe;

But this Practice is now altered.

for

for although the Anſwer be ſhort in one Point only, and all other Parts of the Bill be anſwered, yet it ſhall be deemed as no Anſwer; and if a full Anſwer be not filed, the Bill may be taken as confeſſed.

These Bill to be taken as confeſſed, where the Defendant in Contempt only is to be affected, but not where a third Perſon may be injured.

But it is held, that on theſe Hearings upon Sequeſtrations, the Bill is to be taken as confeſſed in no Caſe, but where the Defendant in Contempt only is to be affected by the Decree; but not where the Intereſt of a third Perſon may be injured who is not in Contempt, as in the Caſe of a Truſtee and *Ceſtuique* Truſt; or of Partners in Trade; or where the Remedy is at Law; in which laſt Caſe, by taking the Bill as confeſſed againſt a Defendant, an inconſiſtent or abſurd Decree might paſs, which Courts of Equity are to be careful never to permit. See the Caſe of *Carleton* and *Carr*, in this Court, 26th *June*, 1758.

After Plea or Demurrer over-ruled, and Defendant ordered to anſwer, if he refuſes, the Bill ſhall be taken as confeſſed.

If the Defendant pleads, or demurs, and the Plea or Demurrer is over-ruled, and the Defendant ordered to anſwer, if he refuſes, the Bill may be taken *pro confeſſo*. 1 *Har. Chan. Pra.* 393. 3d Edit.

After a Decree to have a Bill taken *pro confeſſo* is confirmed and enrolled, on what Conditions the Defendant ſhall

Where the Proceſs of Contempt have run againſt a Defendant to a Sequeſtration, and there is Decree to have

be at Liberty to bring a Bill of Review, or a croſs Bill.

the Bill taken *pro confeſſo*, and the ſame confirmed and enrolled, and the Defendant hath been duly ſerved with ſuch Decree, and an Attachment iſſued for Non-performance thereof, he ſhall not be admitted to bring a Bill of Review and Reverſal, without performing the Decree, or giving ſufficient Security to perform the ſame, in Caſe the Court upon Application, think fit to direct the ſame, nor to bring a croſs Bill without depoſiting the Money decreed, into Court, (if the Decree be for money;) or giving good and ſufficient Security for the Performance of the Decree, within ſuch Time as the Court ſhall direct, and firſt paying down to the Plaintiff ſuch Coſt as is decreed to him, and the Coſt expended ſince the pronouncing the Decree, and the Coſt of Taxing the ſame.

Court may proceed againſt Truſtees ſerved with Proceſs to a Sequeſtration, as if they had appeared and anſwered.

By the Statute 1 *Geo.* 2. *Ch.* 17. *pars*, The Courts of *Chancery*, and *Exchequer*, may proceed in all Cauſes depending before them by *Engliſh* Bill, and make ſuch Decrees againſt every Perſon who hath been duly ſerved with Proceſs, and have ſtood out to a Sequeſtration, and is only a Truſtee, in the ſame Manner, as if ſuch Truſtee had duly appeared and put in his Anſwer.

By

By 5 *Geo.* 2. *Ch.* 4. *pars*, If ſuch Truſtee hath been duly ſerved with, and ſtood out Proceſs as aforeſaid, no conditional Decree ſhall be pronounced againſt him, on the Hearing of the Cauſe, but the Court ſhall make ſuch abſolute Decree therein, as if he had duly appeared on ſuch Hearing.

No conditional, but an abſolute Decree ſhall be made againſt ſuch Truſtee.

By 5 *Geo.* 2. *Ch.* 8. *pars*, In all ſuch Suits, which are, or ſhall be commenced by *Engliſh* Bill in the *Chancery* or *Exchequer*, where it appears to the Court by Affidavit that the Defendants are only Truſtees, and that diligent Enquiry has been made after them, to ſerve them with Proceſs, and that they cannot be found, the ſaid Courts may hear and determine ſuch Cauſes, and make ſuch abſolute Decrees therein, againſt all Perſons appearing to them to be only Truſtees, as if ſuch Truſtees had been duly ſerved, and had appeared and anſwered, and had appeared by their Counſel and Clerk at the Hearing.

On Affidavit that Truſtees cannot be found to be ſerved, Court may Decree.

Provided, that no ſuch Decree ſhall bind, or in any wiſe prejudice any Perſon, againſt whom it ſhall be made, without Service of Proceſs upon him as aforeſaid, his Heirs, Executors, or Adminiſtrators for, or in Reſpect of any Eſtate, Right or Intereſt which ſuch Perſon

Not to bind Perſons having Eſtates, Rights or Intereſts, to their own uſe.

Perſon ſhall have at the Time of making ſuch Decree, for his own uſe or Benefit, or otherwiſe than as a Truſtee.

How to proceed againſt Mortgagors, or Perſons neceſſary to be ſerved on Bills of Foreclоſure, and abſconding, or out of the Kingdom.

By 7th *Geo.* 2. *Ch.* 14. It is enacted, that upon all Bills of Foreclоſure filed, or to be filed, in the Courts of *Chancery* or *Exchequer*, where it ſhall appear to the Court by Affidavit, that any of the Parties neceſſary to be ſerved for carrying on the Suit, do abſcond or are out of the Kingdom, ſo as, they cannot be ſerved with Proceſs to appear and anſwer, but have been in the Kingdom, within twelve Kalendar Months next preceding ſuch Affidavit, the Courts may order, that Service of the Tenants of the mortgaged Premiſſes; or of the known Agent, or Receiver of the Rents and Profits, and at the laſt place of Abode of the Perſon ſo abſconding, or being out the Kingdom, ſhall be good Service; and upon ſuch Parties neglecting to appear, or not anſwering in four Terms after ſuch Service, the Plaintiff proſecuting ſuch Suit, may proceed to have ſuch Bill taken *pro confeſſo*, as if the Defendant had appeared upon ſuch Service; and the Court ſhall make ſuch Decree as the Caſe will permit, and from time to time make ſuch further Orders, as ſhall be proper for carrying ſuch Decrees into Execution.

Perſons

Perſons reſiding out of, and having an Eſtate in the Kingdom, ſhall be proceeded againſt in the ſame Manner, leaving the Copy of a *Subpœna* at their laſt place of Abode in this Kingdom, if any ſuch they ever had, or with their Stewards, Agents, Managers or Receivers.

And againſt Perſons reſiding out of the Kingdom.

Provided that if the Defendants, or their legal Repreſentatives ſhall within two Years after perſonal Service of ſuch Decree, or if there be no perſonal Service, then within ſeven Years after making ſuch Decree, pay or give ſuch Security as the Court ſhall approve of, to pay the Coſts which the Plaintiff hath neceſſarily been at, and apply to the Court to be let in, to appear and anſwer, and make ſuch Defence as the Caſe will permit, the Court ſhall permit them to appear, anſwer, and make Defence: And in ſuch Caſe, there ſhall be the ſame Proceedings, Decree, and Execution, as might have been in Caſe the Defendant had originally appeared, and the Proceedings had been newly begun, and there had been no former Decree, or Proceedings; and if no Defence ſhall be made within the reſpective Times aforeſaid, ſuch Decree ſhall be abſolute and final.

Defendants or their Repreſentatives may in two Years after perſonal Service of the Decree, or ſeven Years after making the Decree, if no perſonal Service, be let in to make Defence on paying or giving Security for the Coſts.

And Proceedings to be a new, as if there had been no former Decree.

If

On Bill taken *pro confeſſo*, Plaintiff may on ſuch Notice as aforeſaid examine *de bene eſſe*.

If any Bill be taken *pro confeſſo* in Default of Appearance as aforeſaid, the Plaintiff may give Notice, (as before directed to compel an Appearance,) that he intends to examine Witneſſes in two Months after ſuch Notice, which Notice being given, and the Service thereof made appear by Affidavit, to be lodged with the proper Officer, and the Time limited being run out, the Plaintiff may by Order and leave of the Court, examine Witneſſes *de bene eſſe*, as well to the Proof of any Exhibit, as to any other Matter neceſſary to be proved in the Cauſe; but ſuch Depoſitions ſhall not be publiſhed without the ſpecial Order of the Court.

But Depoſitions not to be publiſhed, but by Order of Court.

But if a Defendant after ſuch Decree makes Defence and any of the Plaintiff's Witneſſes die, ſuch Depoſitions ſhall be good, but the living Witneſſes ſhall be re-examined.

If after ſuch Bill ſhall be taken *pro confeſſo*, the Defendant do come in and anſwer as is before directed, and if any of the Witneſſes examined for the Plaintiff ſhall die, and if the Plaintiff would have Reaſon to examine ſuch Witneſs, if Iſſue had been joined, then the Depoſition of ſuch Witneſs ſhall be as good as if Iſſue had been joined: But the Witneſſes who were examined and are living, ſhall be re-examined; and not only to the Matters they where formerly examined to, but to ſuch other Matters, which may ariſe from the nature of the Defence made

made by ſuch Defendant, or the Circumſtances ariſing thereupon: And after ſuch living Witneſſes are re-examined and their Depoſitions taken, their former Depoſitions ſhall be void, and ſtand ſuppreſſed, and ſhall not be copyed or publiſhed.

Perſon duly ſerved with Proceſs to a Sequeſtration, and not appearing, the Court may on all Bills, and in all Caſes appoint an Attorney to appear for them, and ſuch Proceedings may be had, as if he had appeared.

By the uſual Practice of Courts of Equity, if Defendants did not appear upon the Service of *Subpœna's* to anſwer, the Courts could not proceed to have the Bill taken *pro confeſſo*, but the Plaintiff was to have run out the Proceſs of Contempt to a Sequeſtration againſt the Defendant, and the Sequeſtrators were impowered to Sequeſter the Defendant's Lands, *&c.* and to receive the Rents; and if the Lands were not ſet, then an Injunction iſſued to put the Sequeſtrators in Poſſeſſion, and they by Order, to ſet, and receive the Rents: This was a kind of Remedy, but not an adequate one, and great Inconveniencies, and often Failure of Juſtice ariſing from hence, to Remedy this,

It was enacted, by the aforeſaid Statute, 7 *Geo.* 2. *Ch.* 14. That where a Defendant to any Bill in the *Chancery*, or *Exchequer*, appears to be duly ſerved with Proceſs of Contempt to a Sequeſtration, and neglects to appear by his ſix Clerk, or Attorney in the uſual Manner, the Court may appoint a Clerk in Court

Court to appear for him, and then ſuch Proceedings may be had in the Cauſe, as if he had actually appeared.

Attorney appointed and Cauſe ſet down to be heard, the Method.

The Attorney for the Defendant in this Caſe, is appointed by the Court, upon Motion for that Purpoſe, by a Counſel for the Plaintiff, on which Motion, he is to produce an Affidavit of the Service of the *Subpœna*, a Certificate from the proper Officer of no Appearance being entered, or Anſwer filed, and the Sequeſtration and Return; and the Plaintiff's Attorney may then move the Court, to have the Cauſe ſet down to be heard as aforeſaid, and may ſet the ſame down in the Paper of Cauſes, to be heard as is before directed; and on ſuch Hearing, he is to produce the Sequeſtration and Return, the Order for Hearing, and a Certificate of an Appearance being entered, purſuant to the Appointment of the Court. But note, the Plaintiff in this Caſe, is not obliged to ſerve the Defendant with *Subpœna* to hear Judgment, he is only to ſerve his Attorney with the Order for Hearing.

Decree always abſolute.

And in this Court, this Decree upon the * Sequeſtration is always abſolute, whether

* This Practice of the Decree upon the Sequeſtration, being always abſolute, whether it be for Want of an Appearance, or for Want of an Anſwer; may, in the firſt Caſe, be attended with an irre-

whether it be for want of an Appearance, or for want of an Anſwer.

If the Sequeſtration be for Want of an Appearance, it is diſcretionary not obligatory in the Court, to let in the Defendant to his Defence after a Decree obtained.

In the Caſe of *Clement* againſt *Fitzgerald*, in this Court, in *Mich.* Term 1741, upon a Bill being taken *pro confeſſo* (though not a Bill of Foreclоſure,) and a Decree thereon inrolled, it was inſiſted by Counſel, on behalf of the Defendant, that by the ſaid laſt mentioned Clauſe in the aforeſaid Statute, the Court ſhall in all Suits (where an Appearance is entered by the Court,) let the Defendant into his Defence, on paying or ſecuring Coſts. But Lord Chief Baron *Marlay* declared, that the Proviſoe in the ſaid Act for letting the Defendant into his Defence, did not extend to this Clauſe, and that this Clauſe only impowered the Court to order an Appearance to be entered for the Defendant, where he was ſerved with Proceſs, and did not appear, and take the Bill *pro confeſſo*, and make a Decree as if an

irretrievable Injury to a Defendant, as there are many Inſtances, where Proceſs of Contempt have been founded on falſe Affidavits, of the Service of *Subpœnas*, ſo that a Defendant may have his Eſtate ſold before he knows any Thing of the Matter. Where the Defendant has appeared, and the Sequeſtration is for Want of an Anſwer, he undoubtedly cannot have ſo much Reaſon to complain, as it is intirely his own Fault: However, in the Court of *Chancery*, the Decree in both Caſes is but conditional, with a Day to ſhew Cauſe, and is to be ſerved on the Defendant.

an Appearance had been actually entered by the Party; but as to all the other Proceedings in the ſaid Act, they remained the ſame: And further ſaid, that it was not obligatory on the Court, in this laſt Caſe, to let the Defendant in to anſwer, and make his Defence, but a Matter of Favour, and diſcretionary.

But the Rule is to let the Defendant in, on giving Security to abide the Decree, and paying ſuch Coſts as the Court ſhall award.

And as in the *Exchequer*, the Practice always has been, not only where a Defendant ſtands out Proceſs of Contempt to a Sequeſtration, but even to a Commiſſion of Rebellion, that he ſhall enter into Recognizance with Sureties, to be approved of by the Court, to perform the Decree; ſo in Caſes of Decrees founded on Bills taken *pro confeſſo*, purſuant to the ſaid Statute; the Rule is, to let the Defendant in, to anſwer and make Defence, on paying ſuch Coſt as the Court, upon the Circumſtances of the Caſe ſhall Award, and alſo upon entering into Recognizance to abide the Decree of the Court, and eſpecially if the Demand be perſonal. And it was ſo ordered in this Caſe, that the Defendant ſhould give Security to abide the Decree of the Court, re-join and appear *gratis*, and not ſuffer a conditional Decree, and pay the Coſts out of Pocket to be made appear by Affidavit.

In the Caſe of *Green* againſt *Dalloway*, in this Court *Eaſter* Term 1750, the Defendant was let in to anſwer after a

Decree,

Decree, upon a Bill taken as confeſſed, upon giving Security and paying of the taxed Coſts only; but in this Caſe, the Decree was not enrolled, and the Sequeſtration appeared to have been obtained by Surprize.

But in the Caſe of *Kearney* againſt *Steuart*, *Trinity* Term 1753, the Defendant was ordered to pay the Coſts out of Pocket, as no fatality appeared, nor was any Surprize pretended; and in this Caſe alſo the Decree was not enrolled.

Perſons under the diſabilities mentioned in the Act, ſhall have two Years to make Defence, after Service of a Decree on a Bill taken as confeſſed.

But note, it is provided by the aforeſaid Act, that Perſons under the Age of twenty-one Years, or *non ſane* Memory, or *Feme Covert*, at the Time any Decree, in purſuance of the ſaid Act, is made againſt them, ſhall have two Years from the Time of the Service of ſuch Decree upon them, after the Removal of ſuch Diſability, to make their Defence, and ſhew Cauſe againſt the ſame.

Some Doubts on the ſaid Act, 7 *Geo.* 2. in relation to hearing the Cauſe, upon the Appearance of the Attorney appointed by the Court, cleared up, by Stat. 13. *Geo.* 2. ch. 9.

Some Doubts having ariſen upon the aforeſaid Act, whether after ſuch an Appearance by a Clerk or Attorney, appointed by the Court, the Plaintiff is not to begin the Proceſs of Contempt again, and run out the ſame to a Sequeſtration, before he can proceed to hear his Cauſe, which would be a great and unneceſſary Delay to the Suitor. For Remedy thereof, it was enacted by

the 13 *Geo.* 2. ch. 9. to be the true Senſe and Meaning of the ſaid former Act, That after ſuch Appearance by the Appointment of the Court, the Plaintiff or Plaintiffs may proceed to hear his or their Cauſe, upon the Sequeſtration obtained by him or them, as if the Defendant or Defendants had actually appeared and ſtood out ſuch Proceſs of Contempt or Sequeſtration.

Defendant in Cuſtody to be brought into Court by *Habeas Corpus*, before the Bill be taken *pro confeſſo*.

Where a Defendant is in Cuſtody at the Suit of the Plaintiff, or of a Stranger, the Bill ought never to be taken *pro confeſſo*, until he has been brought into Court by *Habeas Corpus*, and told of the Danger he is in, if he does not anſwer; and a Day given him to put in his Anſwer, that the Court may Judge whether he is obſtinate, or unable through Poverty or otherwiſe to Anſwer. *Curs. Canc*, 115. *Moſeley's Rep.* 384.

Decree on a Sequeſtration irregular, it cannot be referred, it muſt be re-heard.

If a Decree is made on a Sequeſtration irregularly, Defendant may petition to re-hear, but it cannot be referred to a Maſter for irregularity; for this Decree binds the Right, as well as any other Decree; and if there be any Error in it, it is an Error of the Judgment. *Ibidem.* 295.

If an Account be directed on the Decree *pro confeſſo*, the Defendant's Attor-

But note, where a Bill is taken *pro confeſſo*, and an Account directed to be taken, the Defendant's Attorney is to be ſerved with Summonſes to attend the Officer

Officer thereon, as if the Defendant had appeared on the Hearing, and on his Non-attendance, the Plaintiff's Attorney muſt obtain an Order to proceed *ex Parte*, as is before directed. See the Caſe of *Johnſton* againſt *Walcot*, in this Court, *Mich.* 1745.

ney is to be ſerved with Summonſes, and the Proceedings to be as if the Defendant had appeared on the Hearing.

Fifth. *Of Hearing upon interlocutory Decrees, and on Equity reſerved, where an Iſſue is directed to be tried at Law.*

AN interlocutory Decree, as is before mentioned in Pa. 409. is where the Court decides ſome incidental intervening Queſtion, upon the principal Matter.

Interlocutory Decree.

Or where the Court doubts of any Fact, and directs an Iſſue to try it: This is an interlocutory Decree, and is alſo called a leading Order. For the Proceedings thereon, ſee *Title Order*.

Sixth, *Of Hearing* ad Requiſitionem Defendentis.

BY the 49th general Rule, when a Cauſe is ready for Hearing, if the Plaintiff delay the Proſecution, or be

RULE 49.

negligent to procure a Hearing, the Defendant may (if he will) procure the Cauſe to be ſet down for Hearing, and ſerve the Plaintiff with Proceſs, *ad audiendum Judicium*, at which Day, if the Plaintiff will appear, he may proceed to Hearing; but if he will not, the Defendant may be diſmiſſed with Coſts, and left at Liberty, if there were any Injunction or Order to reſtrain him.

If Plaintiff will not proceed, Defendant ſhall be diſmiſſed with Coſts, and left at Liberty, if reſtrained by Injunction or Order.

When thePlaintiff hath replyed, theDefendant may forthwith re-join; and if the Plaintiff after Rejoinder neglects to proſecute his Cauſe, or to proceed to examine Witneſſes, and has lapſed a whole Vacation; the Defendant, if he has no Witneſſes to examine, may, the next ſucceeding Term, put a Rule on the Plaintiff to examine his Witneſſes the next following Vacation, or the Cauſe to be heard the next Term, on the Pleadings. And if the Defendant has any Witneſſes to examine, he may on ſuch default of the Plaintiff as aforeſaid, move the Court by his Attorney to enforce the Plaintiff to go to a Commiſſion, or in default thereof, that the Defendant may have a Commiſſion *ex Parte*, to ſuch Commiſſioners as the Court or Chief Remembrancer ſhall appoint. Or he may examine his Witneſſes before a Baron. See the 13th Rule, *Title Replication and Rejoinder*.

How the Defendant is to proceed to have the Cauſe heard, where Plaintiff after Replication neglects to proceed.

So

So likewiſe, the Plaintiff hath one Term after paſſing Publication, to conſider whether he will proceed to the Hearing of his Cauſe or not; and if he fails to ſet it down in that Time, the Court will order it to be heard *ad Requiſitionem Defendentis*, becauſe the Plaintiff has then delayed the Defendant, by lapſing the Time in which he was to hear the Cauſe.

Or after Publication.

And in either Caſe the Defendant may ſerve the Plaintiff with *Subpœna* to hear Judgment; and if the Plaintiff doth not appear on the Hearing, on Affidavit made of the Service thereof, and of the Order for Hearing, the Plaintiff's Bill ſhall be diſmiſſed abſolutely; becauſe here are not to be two Decrees, ſince the Plaintiff, who is the Aggreſſor, is always to be ready to maintain the Juſtice of his Cauſe.

And the Proceedings in either Caſe.

And this Proceeding in Equity is analogous to the Trial by *Proviſo* at Common Law, where, after Iſſue joined, if the Plaintiff will not proceed to Trial within the third Term incluſive, the Defendant may then move for a Trial by *Proviſo*.

Analogous to the Trial by *Proviſo* at the Common Law.

But if the Plaintiff ſets his Cauſe down regularly for Hearing, and when it is called on, is not ready, or doth not appear

If the Cauſe be ſtruck out of the Paper, for the Plaintiff's not appearing at the Hearing, and he applies to have

it again ſet down, it ſhall be after all the Cauſes then ſet down.

appear, it ſhall (as has been ſaid before) be ſtruck out of the Paper, and he muſt apply to have it ſet down again: But with this Difference, that as he hath once had his Turn, and might have been ready if he had thought fit, ſo he ſhall be poſtponed, until all the Cauſes which are then ſet down, are heard; and his Cauſe ſhall be ſet down after all thoſe which are then appointed and ſet down; and then he will have a ſecond Turn for the Hearing of the Cauſe.

The Defendant cannot put a Rule on Plaintiff to examine, or the Cauſe to be heard on the Pleadings, until the Cauſe is at Iſſue.

But note, the Defendant cannot put a Rule on the Plaintiff to examine his Witneſſes, or that the Cauſe may be heard on Bill and Anſwer, until the Cauſe is at Iſſue. For firſt, the Defendant can oblige the Plaintiff to reply, or he may diſmiſs his Bill: And then, when the Plaintiff hath replied, the Defendant as ſoon as he pleaſes may re-join, whereby the Cauſe is at Iſſue.

Of Hearing *ad Requiſitionem Defendentis*, and of the Proceedings where either Plaintiff, or Defendant neglects to appear at the Hearing, and of conditional Decrees and Diſmiſſes, and the Proceedings thereon, ſee *Title Decree, and Diſmiſs, per. tot.*

Every

Every Cauſe in the Paper is to be heard in its Courſe, unleſs a Peer of the Realm, or Privy Council, be concerned, and he comes upon the Bench; in which Caſe, it is uſual (after the Cauſe then in Hearing is over) to call the Nobleman's Cauſe; yet if it ſtands low, and the adverſe Counſel ſay they are not ready, but will be ſo, when the Cauſe is called on in its Courſe; in this Caſe, the Court never forces them to go on, unleſs both Sides are ready; but the Nobleman muſt ſtay till his Cauſe is called, and comes on in Courſe,

The Preference to be given to a Peer of the Realm, as to the Hearing of his Cauſe.

Some Inſtructions for briefing Cauſes, in all Caſes.

WHEN the Cauſe is ready for Hearing then the Briefs for Counſel are to be prepared. Here now is the Field for the ſkilful Agent to exerciſe, and exhibit all the Knowledge and Abilities he has, and all the Powers of his Profeſſion; for in the well ordering of the Brief (eſpecially if there have been Proofs in the Cauſe,)

The Advantages in well briefing the Cauſe.

the Succeſs of Cauſes, I may venture to ſay nineteen in twenty, moſt certainly depends. I ſhall therefore for the Sake of thoſe who are beginning the Buſineſs, lay down the following Rules.

If there be a great Variety of Pleadings.

If there be a great variety of Pleadings, (as often happens in a Cauſe) let them be ſo ranged that they may follow in an eaſy Chain, as thus.

If Bill and amended Bill before Anſwer.

If there be a Bill and an amended Bill before Anſwer, unleſs the whole Frame, and Method of the original Bill be ſo altered, that there is no diſtinguiſhing or ſeparating what is added, from what was in the firſt Bill, as if the whole of the firſt Bill be in the ſecond, there will be no occaſion for inſerting any Part of the firſt in the Brief.

But if the Additions, or Alterations, be ſuch as can be eaſily ſeparated and diſtinguiſhed, they only then are to be inſerted in the Brief, with any additional Relief that may be prayed, firſt mentioning the Time of filing it.

Anſwers how to be briefed.

Then inſert the Anſwer, or (if there be ſeveral Defendants) the Anſwers. But here obſerve, that often in Anſwers

ſwers the charging Parts of the Bill are firſt anſwered, and afterwards the ſeveral Interrogatories to each Charge, which is a moſt inelegant Manner of preparing Anſwers, and often cauſes infinite Confuſion: Whereas nothing is more eaſy than to place each Charge and the Interrogatory thereto together, and to anſwer them at one View: Now when they happen to be thus ſeparately anſwered, it is the Agent's Buſineſs to connect them in his Brief, or his Counſel will have a perplexed and troubleſome Work of it.

Amended Bill after Anſwer.

So if an amended Bill ſhould be filed after the Defendant hath anſwered, obſerve the Rules before ſet down as to briefing the Bills; then inſert the Anſwer to the original Bill, and after it all the Variations and Additions, which are in the ſecond Anſwer, and thoſe only, if they can be ſo diſtinguiſhed and ſeparated as is before mentioned; if not, you muſt inſert the whole.

If Exceptions to an Anſwer, and further Anſwer filed.

If Exceptions be taken to an Anſwer, as ſhort and inſufficient, and are allowed, or the Anſwer reported ſhort, and afterwards a further Anſwer filed, you are only to mention this Matter, as alſo the Points unanſwered, very ſhortly, and then only the Additions in the further Anſwer as afore-

If

If Abatement and Bill of Revivor, and no new Matter.

If there be an Abatement and a Bill of Revivor filed, if no new Matter ariſes by the Abatement, the Matter of the Abatement need only be mentioned; that a Bill of Revivor was filed, and the Time of filing; and that on ſuch a Day the Repreſentative appeared, and the Cauſe by Order of ſuch a Date revived: If an Anſwer was required and filed, then to ſhortly mention it, and the Time of filing it.

If new Matter.

If the Bill of Revivor contains new Matter which has ariſen from the Abatement, then this muſt be ſhortly mentioned with the Relief that is prayed.

If a Replication.

If there be a Replication in the Cauſe, it muſt be mentioned; to ſhew that the Defendant was put upon the Proof of his Anſwer.

The great Care required in brieſing them, and the Method to be obſerved therein, in all Caſes.

And laſtly if there have been Proofs in the Cauſe, they are alſo to be added; the brieſing of which, as they ought to be done, I have always looked upon, to be as nice a Part as any whatſoever of the real Buſineſs of an Equity Solicitor.

Ibidem.

Now in order to this, let him firſt ſet down from the Interrogatories the ſeveral

ſeveral Points that were examined to, as neceſſary to be proved; let him then moſt carefully read the Depoſitions to the ſeveral Interrogatories and mark the Witneſſes, if more than one, who anſwer or depoſe to each Interrogatory: But to be ſure to keep the Proofs of each Fact together; for if they be mixed, the Confuſion will be irrecoverable.

If ſeveral Witneſſes anſwer pretty much alike in the Proof of any Fact, he may ſet down all of them together: If there be any Variation, or more or leſs be ſaid, it is an eaſy Matter to ſet down this Variation, Omiſſion, or Addition, firſt mentioning that this Deponent in all other Reſpects agrees with the other. Ibidem.

If only a plain ſimple Fact is proved; no more need be ſet down than this: Ibidem.

Firſt, Deponent *A. B.* of, *&c.* to the ſecond Interrogatory *Lib.* (*C*) *fo.* 10. and,

Second, Deponent, *E. F.* of, *&c.* to the ſame Interrogatory, *fo.* 20. proves the Execution of the Deed of the Day of 1758.

If it be a Fact, which only can be proved by Circumſtances, there the Depoſitions Ibidem.

poſitions muſt be ſo inſerted in the Brief, that the Counſel may judge, if from thoſe Circumſtances, as they are in the Depoſitions, the Fact be ſufficiently proved.

Ibidem. But upon the whole, let the ſeveral Proofs to each Fact be diſpoſed in the Brief in ſuch conciſe, cloſe, connected and familiar Method, that the whole may appear to the Counſel at one View, not ſetting down any of the Wanderings or Impertinencies of Witneſſes, or any Thing that is not neceſſary or needful; and at the ſame Time, not omitting aught that is material. This is a Taſk (let Agents think as they will) of no ſmall nicety and difficulty, and (as I am told) is ſo much thought of in *England*, that in all Cauſes of great Conſequence, the Briefs are generally prepared by ſome of the younger Counſel in the Cauſe, or by what are there called Chamber Counſel.

If Exhibits be to be proved. If any Exhibits are to be proved *viva Voce*, on the Hearing, the Order for this Purpoſe is to be produced; but this may be done at any Time while the Cauſe is in the Paper, by calling it on; due Notice thereof having been firſt given as is before directed. See *Title Exhibits*.

If

If there have been any extraordinary Proceedings in the Cauſe founded upon ſpecial Orders of Court, theſe ſhould be alſo mentioned in the Brief; and the Agent ſhould have all ſuch Orders ready to be produced on the Hearing as they may be demanded, as is above directed.

If any ſpecial Orders in the Courſe of the Cauſe.

And it would be always proper (as is practiſed by ſome Agents) to give Counſel with their Briefs a ſhort ſketch of the import of the ſeveral Pleadings, with the ſeveral material Points in the Cauſe, in order to make them acquainted with the nature of their Client's Caſe, before they enter upon reading the Briefs for Hearing at large: In *England.* it is always done.

A ſhort Sketch of the whole Cauſe to be given with the Briefs.

Should the Cauſe take up more Days than one in Hearing it, the Counſel on each Side ſhould be furniſhed with Copies of the Notes, taken by the Regiſter each Day againſt the ſucceeding one.

Cauſe if ſeveral Days at Hearing, Copie's of each Days Notes, to be given to the Counſel.

Of

Of Infants, and in what Caſes they may ſue, or be ſued, or charged, and how they are to defend themſelves in a Court of Equity.

Infants what.

ALL Perſons before the Age of twenty one Years, are here called Infants.

How far bound in Equity.

Although no Proceedings may be had againſt an Infant on a Judgment or Statute at Common Law, yet it is otherwiſe in Equity; and in many Caſes Infants may be farther bound in Equity, than Law, and they have been obliged to anſwer, when the *Parol* ſhould have demurred at Law. 1 *Ch. Ca.* 164. 1 *Danv.* 260. *Toth.* 108. *Sed vide* 1 *Vern.* 173. 428.

Ibidem.

Alſo an Infant may be here compelled to give a Diſcharge of a Debt due to, and received by him, and, in ſome ſpecial Caſes, he ſhall be concluded by his Agreement: But regularly, though an Infant be twenty Years old, and makes

makes a Contract never ſo much to his Advantage, *&c.* yet the Court will not conclude him, nor make an abſolute Decree againſt him, though by his own Conſent, or the Conſent of Parents, *&c.* except in ſome ſpecial Caſes, upon the Merits of the Cauſe. 2 *Ch. Ca.* 164. 1 *Danv.* 260.

An Infant may ſue in this Court as Plaintiff, by his *prochein Amy*, or next Friend; but if he defends a Suit, it muſt be by his Guardian, and his Anſwer is taken upon the Oath of the Guardian, but the Infant himſelf does not ſwear to the Anſwer. See *Title Anſwer, &c.* How he is to ſue, and how to defend a Suit.

Where an Infant exhibits a Bill, there is no Occaſion for a Guardian to be aſſigned him by the Court, but he exhibits his Bill by ſome proper Perſon, his *prochein Amy*, or next Friend, who is liable to pay the Coſts of the Suit to the Defendant, in Caſe the Court orders any Coſts to be paid. But where the Infant is Defendant, the Guardian aſſigned by the Court is to be called by that Name; yet if the Guardian be not ſo called (though it is at Law, where the Infant is Plaintiff) it is no Cauſe of Demurrer in Equity. Ibidem. *Prochein Amy.*

An Infant may by his *prochein Amy* call his Guardian to an Account, even during May call his Guardian to an Account during his Minority.

during his Minority; and if a Stranger enters, and receives the Profits of an Infant's Eſtate, he ſhall in this Court be looked upon as a Truſtee for the Infant. 2 *Vern.* 342.

All Infant Defendants by their Anſwers put in an early Claim to the Care and Protection of the Court in Relation to their Right, and ought to have it, foraſmuch as they are ſuppoſed unable to take care of themſelves: And all Decrees againſt them give ſix Months, after they come of Age, to ſhew Cauſe.

An Infant cannot be foreclоſed without a Day, but the Lands may be decreed to be ſold.

And an Infant cannot be foreclоſed with out a Day to ſhew Cauſe; (which is commonly ſix Months after he comes of Age) but the Way in ſuch a Caſe is, to Decree the Lands to be ſold to pay the Debts, and that will bind the Infant. 1 *Vern.* 295 2 *Vern.* 342. But if there be a Mortgage which depends upon a diſputable Title, ſo that no Money can be had by an Aſſignment of it over, this Court will not Decree an Infant to be foreclоſed, until ſix Months after he comes of Age. 2 *Vent.* 351.

But if the Mortgage depends upon a diſputable Title.

Lands deviſed to be ſold for Payment of Debts, may be decreed to be ſold without giving the Infant a Day,

Decrees are but very rarely made againſt Infants, without a Day to ſhew Cauſe (which is commonly ſix Months) after they come of Age: But if Lands are

are deviſed to be ſold for Payment of Debts, they may be decreed to be ſold without giving an Infant Heir a Day to ſhew Cauſe, for nothing deſcends to him; but otherwiſe, if he be decreed to join in the Sale. *Cooke* and *Parſon*, 2 *Vern.* 429. *Preced. in Ch.* 185.

otherwiſe, if he be decreed to convey.

Where a Decree is againſt an Infant, with a *niſi Cauſa*, in ſix Months after he comes of Age, he may, on Counſel's Motion, obtain Liberty to amend his Anſwer, or put in a new Anſwer, and thereby ſet forth his Title, he having no other Way than this to ſet forth his Right, which he ought to have an Opportunity of doing; for were the Infant to be bound by the Anſwer of his Guardians, it would be at the ſame Time that the Court gave him Liberty to ſhew Cauſe, to tie up his Hands from ſhewing Cauſe. See 1 *Williams* 504. 3 *Williams* 402. where it is ſaid to be a Matter of Courſe, and granted on a Petition *ex Parte*. And ſee before *Title Decrees*.

Infant when he comes of Age may put in a new Anſwer, or amend his Anſwer.

And ſee *Moſeley's Rep.* 313. where it is held to be a good Cauſe why a Decree ſhould not be made abſolute againſt an Infant, after he comes of Age, that he has put in a new Anſwer, and in the ſame Caſe Pa. 203, the Court enlarged the Time for the Defendant to ſhew Cauſe, after he came of Age, why the Decree ſhould not be made

And he may file a Bill of Diſcovery againſt the Plaintiffs in the firſt Cauſe, and the Decree ſhall not be made abſolute till they anſwer.

abſolute, till the Plaintiffs in the firſt Cauſe, had put in an Anſwer to a Bill of Diſcovery he filed againſt them, after he came of Age.

And may examine to prove his Defence.

Note, the Conſequence of an Infant's putting in a new Anſwer is, that he may examine Witneſſes anew to prove his Defence, which may be different from what it was before. 2 *Williams* 402, *Moſeley's Rep.* 68.

Infant Defendant, not obliged to ſhew that the former Defence was improper, or that he has a better Defence to make, nor to pay Coſts before let in; but the Court will make the Plaintiff amends by Coſts if the Defence be frivolous.

In the Caſe of *M'Allen* againſt *Hatton*, in this Court, *Hillary* Term, 1737. an Infant having put in an Anſwer, and having arrived at full Age when the Cauſe was in the Paper ready for Hearing, applied to be let in to make a new Defence: Upon the Motion, it was inſiſted for the Plaintiff, That it ſhould appear to the Court, that there had been an improper Defence, and that the Defendant had a better Defence to make, and That if the Defendant was let in, it ſhould be on the Terms of paying Coſt; but the Court were of Opinion, that the Courſe was to let the Defendant into his new Defence without paying Coſt; but that if on the Hearing, the new Defence appeared to be frivolous, they had it in their Power to make the Plaintiff amends, by the Coſt they may award him.

If

If an Infant anſwers by Guardian, and a Decree is againſt him without a Day to ſhew Cauſe, ſuch Anſwer ſhall not be read, or admitted as Evidence againſt him when of Age; but otherwiſe of a ſuperannuated Defendant, who puts in his Anſwer by his Guardian. *Trin.* 1704, Sir *Richard Leving* and *Lady Caverly*. *Preced. in Chan.* 229.

His Anſwer by Guardian no Evidence againſt him when of Age, if Decree be without a Day to ſhew Cauſe; otherwiſe, of a ſuperannuated Defendant.

The Anſwer of an Infant may be referred for Scandal, but it being upon the Oath of the Guardian, he, and not the Infant, ſhall be liable to pay the Coſts, or rather the Counſel who ſigned ſuch Anſwer.

Anſwer of Infant may be referred for Scandal, but the Guardian or Counſel to pay the Coſts.

A Sequeſtration may iſſue againſt an Infant for not appearing. 2 *Ch. Ca.* 163.

A Sequeſtration may iſſue againſt an Infant.

It is ſaid an Infant may be charged in Trover becauſe a Tort, but not on a Contract, nor as Bailiff, nor for Goods to carry on a Trade; and therefore, when made Factors, Securities ſhould be taken from their Friends for their accounting. *Trin.* 1700. between *Smally* and *Smally*. *Bac. Eq Ca.* 6.

In what Caſes chargeable or not chargeable.

If an Infant Plaintiff, or Defendant, arrives at full Age pending a Suit, a Motion is to be made by his Attor-

Infant arriving at Age pending a Suit, Motion to be made to proceed in his own Name.

ney, for an Order that all the future Proceeding may be in his own Name, which the Court will grant, and this Order need not be ſerved, nor the Bill amended or altered.

Any Perſon may bring a Bill as *procheinAmy* to an Infant, but cannot in the Name of a *Feme Covert*, without her Conſent.

Any Perſon may bring a Bill as *prochein Amy* to an Infant, without his Conſent; becauſe it is at his Peril that brings it to be anſwerable for the Event: But none can bring a Bill in the name of a *Feme Covert* as her *Prochein Amy*, without her Conſent, and if ſuch Bill be brought, upon her Affidavit of the Matter, it will be diſmiſſed.

Infant barred by the Statute of Limitations, from bringing a Bill for an Account of Profits.

Where one receives the Profits of an Infant's Eſtate, and he neglects to enter ſix Years after he comes of Age, he is as much bound by the Statute of Limitations, from bringing a Bill for an Account of Profits, as he is from an Action of Account at Common Law. *Preced. inCh.* 518.

Suit by Adminiſtrator *durante minoriÆtate*, determined on Infant's coming of Age, unleſs a Decree to an Account be obtained.

By an Infant's coming of Age, Adminiſtration, *durante minoriÆtate*, ceaſes, and the Suit by ſuch Adminiſtrator is thereby determined, ſo that the Infant cannot go on therewith, but muſt begin anew, unleſs a Decree to an Account were had; in which Caſe the Infant, on a Bill brought for that Purpoſe, may be allowed to go on therewith. *Quære* if ſuch

ſuch Adminiſtration had been *cum Teſtamento annexo. Preced in Chan.* 174.

One deviſes one Thouſand Pounds, to be laid out in a Purchaſe of Lands in Fee, for the benefit of *A. B.* and *C.* and their Heirs, equally to be divided, *A.* dies, leaving an Infant Heir; *B.* and *C.* may have their ſhares paid them in Money; but as to the ſhare of the Infant, it muſt be put out for the benefit of the Infant; who by reaſon of his Infancy, is incapable of making an Election; beſides that ſuch an Election might, (were he to die during his Infancy) be prejudicial to his Heirs. 1 *Williams*, 389.

Money deviſed to be laid out in the purchaſe of Lands in Fee, an Infant who is to have the Benefit thereof, cannot make his Election to have the Money.

One borrows Money during his Infancy, and applies it to the buying of Neceſſaries, and afterwards coming to Age, deviſes his Lands to Truſtees for Payment of his Debts with Intereſt, and dies, the Debt contracted during Infancy is within the Truſt. And in all Caſes when an Infant borrows Money, and applies it towards Payment of his Debts for Neceſſaries, although he may not be liable at Law, he muſt nevertheleſs be ſo in Equity; becauſe in this Caſe the Lender of the Money ſtands in the Place of the Perſon paid, *viz.* the Creditors for Neceſſaries, and ſhall recover in Equity, as the other ſhould have done at Law. *Ibidem*, 558.

Infant borrows Money and applies it to the Payment of his Debts for Neceſſaries, he ſhall be liable in Equity, though not at Law.

And this Debt ſhall be paid out of a Truſt Eſtate, deviſed for Payment of Debts.

No Laches to be imputed to an Infant, or *Feme Covert.*

No Laches are to be imputed to a *Feme Covert*, or to an Infant. *Ibidem*, 718. *Sed vide* 1 *Vern.* 256. where the Poſſeſſion was recovered in the Life-time of the Infant's Father, in ſuch Caſe, it was determined that Laches would run againſt the Infant. But Equity will relieve, and not ſuffer him to be barred by the Laches of his Truſtees; nor to be barred of a Truſt Eſtate, during his Infancy; and the Infant in this Caſe ſhall have the mean Profits. 2 *Vern.* 368. See *Title Limitation.*

Though an Infant cannot bring a Bill for an Account againſt his Guardian during his Minority, yet a third Perſon may.

The Law is particularly favourable to, and careful of, an Infant's Intereſt; and though the Infant himſelf cannot bring an Account againſt the Guardian, until his coming of Age; yet a third Perſon may bring a Bill for an Account againſt the Guardian, even during the Minority of the Infant. 2 *Williams* 119.

At Common Law, an Infant is liable to pay Coſts, if the Judgment be againſt him.

At Law the Infant is liable to pay the Coſts, if the Judgment be againſt him; as if an Infant brings an Action of Battery, and has a Verdict againſt him, he muſt pay the Coſts and if the Common Law; be ſo, why ſhould it not be ſo in Equity, otherwiſe an Infant would be left at Liberty to plague Mankind as he thinks fit. *Ibidem*, 297, 298.

And

And therefore if an Infant by *Procheın Amy* brings a Bill, and never ſtirs in it after he comes of Age, and the Bill is diſmiſſed; if it be a general Diſmiſſion, the Defendant has his Election, whether he will ſue the Infant, or *Procheın Amy*, for ſuch Coſts. *Sed Quær.* if the Infant pays them, if he may take his Remedy over againſt the *Procheın Amy*. *Ibidem.*

So he ſhall in Equity, if he brings a Bill, and never ſtirs in it, after he comes of Age, and the Bill is diſmiſſed.

Where an Infant in his Bill by miſtake of his Agent, ſubmits to any thing that will be prejudicial to him, this will not be binding, but he will be allowed to amend. 2 *Williams Rep.* 387. *Sed vide Moſeley's Rep.* 198. 199. where an Infant to a Creditor's Bill, inſiſted that the Parol ought to Demur during the Minority, it was ordered accordingly, although his Counſel would have waived it, as prejudicial to him. In the Caſe of *Cecil* againſt the Earl of *Saliſbury*, it was determined, that an Infant ſhall be bound by the Offer made in his Anſwer, if the other Side are thereby delayed, and if the Infant does not after coming of Age, apply to the Court to retract his Offer, and amend his Anſwer. 2 *Vern.* 224.

If Infants be bound by what is prejudicial to them in the Bill or Anſwer, filed by them

And in the Caſe of Lord *Brooke* againſt Lord and Lady *Hertford*, in *Hillary* Term 1728, Lord Chancellor declared

Ibidem.

That an Infant when he is Plaintiff, is as much bound, and as little privileged as one of full Age. 2 *Williams* 519.

The Guardian of an Infant to be ſerved with *Subpœna* to hear Judgment, not the Infant.

Where an Infant is Defendant, the Affidavit of the Service of the *Subpœna* to hear Judgment muſt be, that the Guardian was ſerved, not the Infant; and this (as it ſeems) though the Infant be above fourteen, or want ever ſo little of Twenty-one, and theService of the Infant is not good; for *non conſtat* but the Infant might be in his Cradle, or ſhould it appear by the Bill, that he is near Twenty one; yet being not able to defend himſelf, the Service muſt be on the Perſon appointed by the Court to defend him. 2 *Williams Rep.* 643.

Exchequer in *England* will not examine a Witneſs *viva Voce*, to prove a Deed where an Infant is a Party.

In the *Exchequer* in *England*, where an Infant is Party, and his Intereſt is concerned, the Court does not allow of an Order to examine a Witneſs *viva Voce*, to prove a Deed or Exhibit, but the Witneſs muſt be examined in the Office upon Interrogatories. *Ibidem*. 464.

If one enters upon the Lands of an Infant, he ſhall when of Age, recover the Profits from the Time of Entering.

Where a Perſon enters upon the Lands of an Infant, ſuch Infant (when he comes of Age) ſhall by a Bill in Equity recover the Profits from the Time of the firſt Entry. The Reaſon is, when one enters on an Infant, he is chargeable as Bailiff or Guardian, and no Laches ſhall be imputed

imputed to the Infant; wherefore it will be conſtrued, as if he had entered as ſoon as his Right accrued. But where there is a Verdict againſt an Infant's Title, he can have no Account until he has recovered at Law. *Ibidem*, 645. 1 *Vern.* 295. 2 *Vern.* 342.

So if a Man, during a Perſon's Infancy, receives the Profits of an Eſtate, to which the Infant is intitled; and continues to do ſo for ſeveral Years after the Infant comes of Age, before any Entry is made upon him, yet he ſhall account for the Profits throughout, and not during the Infancy only. *Paſch.* 1699. *Yallop* and *Holworthy*. *Bac. Eq.* Caſes, 280. But the Infant muſt enter in ſix Years after he is of Age, as is before mentioned. See *Prec. in Chan.* 518.

So where a Perſon receives the Profits of an Infant's Eſtate, and continues to do ſo after he comes of Age, before Entry on him, yet he ſhall account throughout.

If there be no Truſt, nor Infant in the Caſe, nor any Entry made by him who is intitled to the meſne Profits, Equity will not Decree any Account of the Rents and Profits. 2 *Vern.* 724.

Otherwiſe where there is no Infancy, Truſt, nor Entry made.

If an Infant be aggrieved by a Decree, he is not bound to ſtay till he is of Age, but may as ſoon as he thinks fit, bring a Bill of Review, or may re-hear, or bring an Original Bill, and alledge ſpecially the Errors in the former Decree. But if the Decree againſt the Infant be not fraudulent, though in every reſpect not

Infant aggrieved by a Decree, may bring a Bill of Review, re-hear, or bring an original Bill, even during Minority. But the Court will not ſet aſide the Decree if not fraudulent, though not ſo equitable.

not ſo Equitable, the Court will not ſet it aſide. 1 *Williams*, 735. 737.

But ſhall not bring a new Bill, or amend his former Bill, in any Points wherein it had been diſmiſſed on the Merits.

But it is ſaid, that an Infant, although he be aggrieved by a Decree, ſhall not be allowed at any Time to bring a new Bill, or to amend his former. See *Moſeley's Rep.* 68. where it is ſaid, that in the Caſe of Sir *John Napier* againſt Lady *Effingham*, *& e contra* in *Hillary* Term, 1726, Lord Chancellor aſſiſted by the Maſter of the Rolls, declared he had directed Precedents to be ſearched for, and that none appeared for amending a Bill in any Points, wherein the ſame had been diſmiſſed, upon the Merits, and refuſed to let Sir *John Napier* bring a new Bill, or amend his former, but gave him Liberty to rehear.

What Acts of Infants are good, void, or voidable; and when they ſhall be bound by the Acts of others.

At what Time an Infant may make a Will.

AN Infant Female, may make a Will, and diſpoſe of her perſonal Eſtate, at twelve Years of Age, an Infant Male, at Seventeen, or at Fourteen, if proved to be of Diſcretion. 1 *Vern.* 255. 2 *Vern.* 469. *Preced in Ch.* 316.

An

An Infant may be a Truſtee as well as one of full Age. 2 *Vern.* 561. Infant may be a Truſtee.

Where an Eſtate is given to an Infant, upon a Condition, ſuch Act, as an Infant can perform, muſt be done by him; and Infancy in ſuch Caſe is no Excuſe. 2 *Vern* 343. 1 *Williams*, 560. By what Conditions an Infant ſhall be bound.

And Infants ſhall be bound by Conditions in Fact, and by all Conditions, Charges, and Penalties in an original Conveyance, whether he comes to the Eſtate by Grant or Deſcent. 1 *Inſt.* 233. 1 *Mod.* 300. Ibidem.

If an Infant ſells Lands for Money, with which he purchaſes other Lands, yet this Sale made by him ſhall not be helped in this Court, becauſe he is diſabled by a Maxim in Law. 16 *Jac.* 1. *Dodderidge* and *Hutton.* 1 *Roll. Abr.* 876. Sale by Infant not good.

But if an Infant makes an Agreement, and receives Intereſt under it after Age, ſuch Agreement ſhall be decreed againſt him. *Hillary* 1682. *Franklin* and *Thornebury.* 1 *Vern.* 132. So if he exchange Lands, and continues in Poſſeſſion after Age, he ſhall be bound by it. 2 *Vern.* 225. But if when he is of Age, he aſſents to an Agreement made under Age, it ſhall be good.

If

Infants bound by the Offer in his Anſwer, unleſs he retracts immediately after he is of Age.

If an Infant deſires that Lands ſubject to a Truſt for paying the Portions of younger Children, may not be ſold, and offers by his Anſwer to ſettle other Lands for raiſing the Portions, he ſhall be bound by ſuch Offer, if the other ſide are thereby delayed, and if he does not immediately after Age, apply to the Court to retract his Offer, and amend his Anſwer. *Cecil* and the Earl of *Saliſbury*. 2 *Vern.* 224.

Infant may by Will, deviſe the Payment of a Sum of Money due by Bond.

And if an Infant borrows a Sum of Money, for which he gives a Bond, and deviſes his perſonal Eſtate (being of ſufficient Capacity) for the Payment of his Debts, particularly thoſe he had ſet his Hand to, this Bond Debt ſhall be paid. 1651, *Hampton* and Lady *Sydenham*, *Nel. Ch. Rep.* 55. *Octavo* Edit.

Infant Executor, may aſſent to a Legacy, if there be Aſſets.

If an Infant Executor aſſents to a Legacy, ſuch Aſſent ſhall be good, if there are ſufficient Aſſets beſides, to pay Debts, otherwiſe not. 1 *Cha. Ca.* 256.

But cannot bind himſelf by his Aſſent.

But an Infant Executor before ſeventeen, cannot bind himſelf by his Aſſent to a Legacy. 5 *Rep.* 20. *Cro. Eliz.* 719. and an Infant Executor, may adminiſter at ſeventeen, but cannot commit a *Devaſtavit*, until of full Age. 1 *Vern.* 328.

Where

Where an Infant is made Executor, Adminiſtration muſt be granted *cum Teſtamento annexo*, to his Guardian, or next Friend *durante minori Ætate*; but the Adminiſtration ceaſes when the Infant is ſeventeen Years old: So if an Infant Executrix before ſeventeen takes a Huſband of full Age, the Adminiſtration immediately ceaſes. 5 *Rep.* 29. 6 *Rep.* 67. 2 *Inſt.* 398.

Infant made Executor, Adminiſtration muſt be granted to another *durante minori Ætate.*

It ceaſes when he is of the Age of ſeventeen, or if a Woman, and ſhe marries before.

But if an Infant is intitled to an Adminiſtration of the Goods of an Inteſtate, Adminiſtration muſt be granted to another, until he is twenty-one; becauſe a Minor cannot enter into a Bond with Sureties to adminiſter faithfully, as required by the Statute 22, 23, *Car.* 2.

But where Adminiſtration of the Goods of an Inteſtate, is granted to another for an Infant, it continues till the Age of twenty-one.

A Fine cannot be taken from an Infant, but a Recovery may, by the King's ſpecial Direction. 1 *Vern.* 461. 2 *Vern.* 225.

A Recovery may be taken from an Infant by the King's ſpecial Direction, but not a Fine.

Where a ſmall Legacy is given to an Infant, Money expended for his Maintenance and Education, ſhall be allowed out of it, though it breaks into the Principal. But where the Legacy is conſiderable, the Maintenance ſhall be reſtrained to the Intereſt of the Money. 1 *Vern.* 255.

Money laid out for Maintenance and Education of an Infant, to be allowed out of a ſmall Legacy, though it break into Principal. But otherwiſe, where Legacy is conſiderable.

And

Equity will decree building Leaſes of Infants Eſtates.

And Courts of Equity have often decreed Building Leaſes for ſixty Years of the Eſtates of Infants where for their Benefit. 2 *Vern.* 225.

Infant ſeized in Fee on Marriage, in Conſideration of a competent Settlement, Covenants to convey her Inheritance to her Huſband, Equity will execute the Agreement.

If a *Feme* Infant ſeized in Fee, on a Marriage with the Conſent of her Guardians, ſhould Covenant in Conſideration of a Settlement to convey her Inheritance to her Huſband, If this were done in Conſideration of a competent Settlement, Equity would execute the Agreement, though no Action would lie at Law to recover Damages. 2 *Williams* 244.

Of Acts for a Child in *Ventre ſa Mere.*

A Child in *Ventre ſa Mere* is capable of taking; may be vouched: A Bill may be brought on its Behalf; and an Injunction to ſtay Waſte; the Mother may juſtify detaining of Writings on the Behalf of a Child in *Ventre ſa Mere*; a Limitation, *Hæredibus de corpore procreatis*, ſhall include Iſſue after born; and ſo, *e converſo*, *procreandis* includes Iſſue already born. 2 *Vern.* 711.

Hæredibus de Corpore procreatis, & procreandis.

The Infant's Anſwer by Guardian ſhall not be read againſt him.

The Anſwer of an Infant put in by Guardian, ſhall not be read as Evidence againſt the Infant. *Secus* of a ſuperannuated Perſon. See *Preced. in Chan.* 229.

Leaſe may be renewed in Caſe of Minors, and how.

By Stat. 11th *Ann. Ch.* 3. If any Perſon, who, in Purſuance of any Covenant

venant or Agreement, in any Leaſe for Life, or Lives, of any Lands, and for renewing the ſame, on Tender and Payment of ſome Fine certain on the Death of any Life, or Lives in ſuch Leaſe, by adding ſuch Life, or Lives, on Failure of the Life or Lives in Being, within the Times of ſuch agreements and Covenants mentioned as the Leſſee ſhall nominate, ought to make ſuch new Leaſe, ſhall be under any Diſability ſo to do, by Reaſon of Infancy, (by Direction of the Court of *Chancery*, or *Exchequer*, ſignified by an Order made upon hearing all Parties concerned on the Petition of ſuch Leſſee,) the Guardian of ſuch Infant, upon ſuch Leſſee's performing all ſuch Matters, as by the ſaid Covenants and Agreements ought to be performed, previous to ſuch Renewal, in ſuch Manner as ſhall by ſuch Order be directed, ſhall renew ſuch Leaſe by adding ſuch new Life, or Lives, as ſhall be named by the ſaid Leſſee, according to the ſaid Covenants and Agreements.

An of *Feme Coverts*, Idiots, and Perſons beyond Seas.

Where a Perſon who by Covenant or Agreement, is obliged to make ſuch Renewals, is diſabled by being under *Coverture*, beyond the Seas, or *non compos Mentis*, the Lord Chancellor or Commiſſioners of the Great Seal (upon Petition made in *Chancery*, and upon

on the Leſſee's performing every ſuch Matter, as by the ſaid Covenants and Agreements ought to be performed, previous to ſuch Renewal) may appoint ſuch Renewal to be made by one of the Maſters of the ſaid Court of *Chancery*, and alſo ſuch Guardian as aforeſaid, ſhall execute ſuch Deed of Renewal, in the Name of the Perſon who ought to have renewed the ſame; which Deed of Renewal, (a Counter-part thereof being perfected by the Leſſee for the uſe of the Perſon having the Reverſion and Inheritance of ſuch Lands,) ſhall be as effectual as if the Perſon under Age, had been of full Age, or as if the other Perſon had not been ſo diſabled, and had ſeverally executed the ſame.

Provided ſuch Perſon under Age, or under ſuch Diſability as aforeſaid, was, at the Time of the Renewal of ſuch Leaſe, compellable to make ſuch Renewal.

Infants ſeized of Eſtates in Truſt, or by way of Mortgage, may convey by the Directions of Courts of Equity.

By Stat. 2 *Geo.* 1 *Ch.* 6. It is enacted, that any Perſon under the Age of twenty-one Years, by the Direction of the Court of *Chancery*, or *Exchequer*, ſignified by an Order, made upon hearing all Parties concerned, upon the Petition of the Perſon, for whom ſuch Infant ſhall be ſeized or Poſſeſſed in Truſt,

or

or of the Mortgagor, or Guardian of ſuch Infant, or Perſon intitled to the Money ſecured upon any Lands, &c. whereof any Infant ſhall be ſeized, or poſſeſſed, by way of Mortgage, or of the Perſon intitled to the Redemption thereof, may convey and aſſure ſuch Lands, and in ſuch Manner, as the Court of *Chancery* or *Exchequer*, ſhall, by ſuch Order direct, to any other Perſon; and ſuch Conveyance and Aſſurance ſhall be as effectual, as if the Infant was of Age.

And every Infant being only Truſtee, or Mortgagee, may be compelled by ſuch Order, to convey and aſſure, in like Manner, as Truſtees, or Mortgagees of full Age, are compelled to convey or aſſign their Truſt Eſtate.

And they ſhall be compelled to convey, by Order of the Court.

In the Caſe of *Hollworth* againſt *Lane*, *Trin.* 1729. *Moſeley's Rep.* 197, upon a Motion made for the Executor of the Morgagee, it was referred to a Maſter, to ſee whether the Heir of the Mortgagee was a Truſtee, within the Act 7 *Ann. Ch.* 19 *Eng.* (which is the ſame with the above Act.) The Maſter reported him to be a Truſtee within that Act, upon which Report an Order was made, that the Heir ſhould aſſign over the Mortgage to ſuch Perſon as the Executor

The Heir of the Mortgagee is a Truſtee within the Act, both for the Mortgagor and the Executor of the Mortgagee.

ſhould appoint, and a Motion was afterwards made to ſet aſide the Report, becauſe the Heir was not a Truſtee for the Executor by the Meaning of of the Act, and becauſe the Reference was made on a Motion, whereas the Statute requires it ſhould be by Petition.

Ibidem. And upon this Motion his Lordſhip declared, that there can be no Doubt but a Mortgage in Fee deſcends on the Heir of the Mortgagee; but it is as certain that the Money belongs to the Executor, ſo that the Heir is only his Truſtee; and this was the very Inconvenience that the Statute was made to remedy; that the Mortgagor might be willing to pay the Money, or the Executor might want it, and that in either Caſe, they ſhould not be obliged as formerly, to wait the full Age of the Heir. *Moſeley's Rep.* 197.

A Motion is a Petition, and in this Caſe a Reference may be prayed by either. And his Lordſhip declared, that a Motion is a Petition not reduced into Writing, and preſented; and that he did not know that the Statute did require theſe Circumſtances, and that the general Practice is to pray a Reference by Motion.

Heir of Vendee a Truſtee for the Perſon who paid the Purchaſe Money. And in the ſame Caſe it was held, that the Heir of the Vendee was a Truſtee within the ſaid Act, for the Perſon

Perſon who paid the Purchaſe Money.

See *Preced.* in *Ch.* 284, where it is ſaid, the Conſent of the next Heir at Law to the Infant, was required to the Conveyance.

The Conſent of next Heir at Law requiſite, *&d Quær.*

But note, the Court will not on Motion, or Petition, order an Infant Truſtee to convey, unleſs the Truſt appears in Writing; but in ſuch Caſe, will leave the *Ceſtuique* Truſt to bring his Bill, and have a Decree againſt the Infant to convey, becauſe the Orders for an Infant Truſtee to convey, ought to be in the plaineſt Caſes, and not in ſuch as are ſubject to Diſputes, which Truſts without Writing may be liable to. 2 *Williams*, 546.

But the Truſt muſt appear in in Writing, or the Court will leave the *Ceſtuique* Truſt to get a Decree.

Injunctions.

AN Injunction is a Writ remedial, in Nature of a Prohibition, ſometimes iſſuing out of this Court upon a Bill filed: And it may be granted either to ſtay Proceedings at Law; or to prevent frequent Diſtreſſes; or to ſtay Waſte, or Damage to the Freehold or Inheritence of any other, by felling

Injunction what.

In what Caſes granted.

Timber, *&c.* or it may be, to yield up, quiet, continue, or reſtore, the Poſſeſſion of Lands, *&c.* But this laſt ſort of Injunction is a judicial Writ, and ſubſequent to a Decree, being in Nature of a Writ of Execution, or *Habere facias Poſſeſſionem*, at the Common Law. See *Title Decree.*

Ibidem. But ſometimes, in ordinary Caſes, Injunctions are granted to quiet, or reſtore Poſſeſſions before Hearing. And alſo Injunctions in Nature of Writs of *Eſtrepment* at Law, to ſtay Waſte, Deſtruction and Spoil: For the Proceedings on theſe, ſee the Proceedings upon poſſeſſory and injunction Bills, under *Title Bill.* See *Bunb. Rep.* 110.

And Firſt, *of Injunctions to reſtore and quiet the Poſſeſſion of Lands, in Caſes of forcible entry and Detainer, and of Injunctions to ſtay Waſte,* &c. *and in what Caſes they ſhall be granted.*

Forcible entry what. FORCIBLE Entry, is when one or more with unuſual Weapons, violently enter a Houſe or Land, or uſe violent and threatning Words, to the Terror of the Party, and by that Means

Means gain Poſſeſſion. 1 *Inſt.* 257. *Bolton,* 103.

Forcible Detainer, where an Entry is peaceable, but Poſſeſſion detained by Force of Arms, or unuſual Weapons, or with Threatnings. *Ibidem,* 103.

Forcible Detainer what.

If a Leſſee holds over againſt the Landlord, it is a forcible Detainer. *Cro. Ja.* 199.

Holding over a forcible Detainer.

If a Leſſee of one Man takes a Leaſe from another who has a better Title, and refuſes to give the Poſſeſſion to the firſt Leſſor, this is a forcible Detainer.

Forcible Detainer by a Leſſee for Years

Perſons continuing in Poſſeſſion of a defeazible Eſtate, after the Title is defeated, are puniſhable for forcible Entry; for continuing in Poſſeſſion afterwards amounts in Law, to a new Entry. 1 *Inſt.* 246.

To continue in Poſſeſſion of a defeazable Eſtate, after it is defeated, is a forcible Entry.

And in all Caſes, where any Diſturbance is given in Houſes or Lands, or the Enjoyment of Water, or Watercourſes, *&c.* whereof any Perſon hath been in Poſſeſſion for three Years and upwards, upon filing a Bill, and proper Affidavits, ſetting forth, That the Party complaining hath been three Years in Poſſeſſion, before filing the

Injunction to reſtore and quiet, upon a Bill filed, and proper Affidavits.

Affidavit what to contain.

that his Title is ſtill in being, and undetermined, and the Force, or Diſturbance committed, the Court will award an Injunction, to reſtore, or quiet, according to the Nature of the Caſe: For the Proceedings at large, ſee *Poſſeſſory Bills*, under *Title Bills.*

Only in two Caſes.

And by the Courſe of the Court, theſe Injunctions, as to Lands, are to be granted in two Caſes only; to ſtay Waſte, and to reſtore and quiet the Poſſeſſion, where the Plaintiff has been three Years before the filing the Bill in peaceable Poſſeſſion. *Moſeley's Rep.* 171.

Water-courſe long enjoyed ſhall preſume a Right.

After a long Enjoyment of a Water-courſe running to an Houſe and Garden, through the Ground of another, it ſhall be preſumed that the Owner of the Houſe has a Right to the Water-courſe, unleſs the other Party can ſhew a ſpecial Licence, or an Agreement to reſtrain it in Point of Time; ſo held, in the Caſe of *Wilſon* and *Stewart*, in the Court of *Chancery*, *Trin.* Term 1748.

Injunction to the Party if Affidavit be full, and Defendant not to be heard until he appears.

If the Affidavit is full, as to the ſeveral Particulars before mentioned, and that the Application hath been made, within the Time preſcribed by the Court for bringing poſſeſſory Bills, (ſee *Poſſeſſory Bills*,) the Court will immediately

diately grant an Injunction to the Party; who, if he be minded to conteſt the Matter, muſt appear as upon an Attachment, and ſubmit to be examined on perſonal Interrogatories.

But if the Affidavit be not full as to any of the aforeſaid Particulars, or doubtful, the Court will give a Day to ſhew Cauſe, and will hear what Defence the Defendant can make, by Affidavit or otherwiſe. But note, in this Caſe, the Defendant is not to appear; ſo, if he would move to ſet aſide the Order, for the Appearance, it is ſaid, cures all Defects, that may be in the Affidavit, as it does in Proceſs; and the Defendant muſt then anſwer perſonal Interrogatories. So determined in the Caſe of *Bourke* againſt Lord *Liſle*, in *Chancery*, on full Debate before Commiſſioners, in *Trinity* Vacation, 1760. See alſo a Caſe in *Chancery*, the 1ſt of *February* 1698, and the 19th of *February* 1725, *Carroll* againſt *Ennis*. And note, in this Court the Defendant has eight Days to appear to the Injunction, in *Chancery* but ſix.

But if Affidavit be not full, or doubtful, the Court will give a Day to ſhew Cauſe.

But Defendant, not to appear.

Time Defendant has to appear.

Although a Man gets into Poſſeſſion by Force, or Fraud, if he continues in an entire Poſſeſſion for three Years, he is intitled to an Injunction upon a forcible Entry; for no Man is to carve a Remedy for himſelf, nor to make Uſe of Force to reſtore himſelf, but ought to

Though a Man gets a Poſſeſſion by Force, or Fraud, yet after three Years, he ſhall have an Injunction, on a forcible Entry.

apply to a Court of Equity to be relieved againſt the Fraud, and to be reſtored to the Poſſeſſion in a legal Manner; or he may bring his Ejectment, and have the Title tried at Law.

Injunctions before Anſwer, and before Trial at Law, to quiet Plaintiff in the Enjoyment of Water-courſes, Mines, &c.

If a Bill is brought, to be quieted in the enjoyment and eſtabliſhment of a Water-courſe, and of Weirs, for working of Stamp Mills, and Mines, or Collieries, diverted and broken down by the Defendant; the Court will grant an Injunction before Anſwer, and make an Order on the Defendant, to put the Premiſſes in the ſame Repair they were before the Injury; and this the Court will do, after a long Enjoyment, before the Right is eſtabliſhed at Law, for fear the Mines, *&c.* ſhould be ruined in the mean Time, and a proper Remedy can be had in no other Court. 2 *Vern.* 290. *Moſeley's Rep.* 89, 90.

Tenant for Life of Coal Mines, may open new Pits, or Shafts, for the working the old Vein of Coals.

In the Caſe of *Clavering* againſt *Clavering*, 2 *Williams* 388, 389, the Defendant was Tenant for Life, but not without impeachment of Waſte, and the Plaintiff was the Remainder Man in Tail, and in the Lands there were ſeveral Coal Mines, which were open before the Defendant came to the Eſtate, and the Defendant, the Tenant for Life, opened the Earth in ſeveral Places, but with Deſign only to purſue the old Vein of Coals; and the Plaintiff moved for an Injunction to ſtay the Defendant, from

from opening the Earth in any new Place, but the Court declared, that Tenant for Life of Coal Mines, may open new Pits or Shafts, for the working the old Veins of Coals, and that it would be hazardous to grant an Injunction to ſtay the Working of a Coal Mine; and Lord Chancellor *King* ſaid, that it ſeemed as if the Tenant for Life may work all Mines, which were lawfully opened by the precedent Tenant in Tail, though ſubſequent to the Settlement, and denied the Injunction.

In what Caſe a Leſſee may bring a Bill, for an Injunction, in the Room of his Leſſor.

One ſeized in Fee of upper and lower Mills, leaſes the lower with the Stream, and covenants for quiet Enjoyment; and after leaſes the upper, and Leſſee covenants not to divert or pen up the ſaid Streams, to the Prejudice of the lower Mills; on a Breach of this Covenant, the Leſſee of the lower Mills, may bring a Bill in the Room of his Leſſor, for an Injunction, without firſt bringing an Action of Treſpaſs. *Moſeley's Rep.* 145.

Injunction only to be granted where the Defendant has been three Years in Poſſeſſion, before the Bill filed, and upon an undetermined Title.

A Truſtee having contracted to ſell an Eſtate, to one Perſon, and the *Ceſtuique* Truſt, having actually ſold it to another, who moved for an Injunction, to quiet him in the Poſſeſſion, being diſturbed by the Truſtee, it was held by my Lord Keeper, that an Injunction for quieting the Poſſeſſion, is only grantable, where

where the Plaintiff has been in Poſſeſſion for the Space of three Years, before the Bill exhibited upon a Title yet undetermined; or in Caſe the Cauſe hath been heard, and Judgment paſſed upon the Merits of the Caſe, by the Court. Lady *Poine*'s Caſe, 1 *Vern.* 156.

Injunction, if to be granted before Bill filed, and in what Caſes.

It is ſaid an Injunction is never to be granted, before Bill filed. 4 *Inſt.* 92. *Vide*, 1 *Vern.* 156, where it is ſaid, that the Defendant cannot have an Injunction, becauſe he has no Bill filed.

Ibidem.

But where a Mortgagee brought a Bill to foreclоſe, and, pending the Suit, an Advowſon appendant to the mortgaged Manor became void, and the Mortgagee being hindered from preſenting, brought his *Quare impedit*, and the Court granted an Injunction, on the Defendant's Application, though he had no Bill filed. 2 *Vern.* 401. 550.

Injunction granted, in Caſe of an Abatement before the Cauſe revived.

So where a Cauſe abated by the Death of Lady *Gerard*, and the Defendant was her Executor, who being ſerved with a Copy of a Bill of Revivor, and the Lord Keeper's Letter, would not appear, being in Privilege, and upon Motion, an Injunction was granted, though the Cauſe was not revived. And the Caſe of *Armſtrong* and *Jackſon* was cited, where, before a Demurrer determined, the Plaintiff had an Injunction

on Motion, *Trin.* 1700, between the Duke of *Hamilton*, and the Earl of *Macclesfield*. *Bac. Eq. Ca.* 285.

So where the Lord *Wharton* had an Injunction, to quiet him in the Poſſeſſion of the Mines in Queſtion; and upon hearing of the Cauſe, an Iſſue was directed to try, whether the Mines in Queſtion, were within the Plaintiff or Defendant's Manor; the Iſſue was tried at Bar, and found for the Plaintiff: When the Plaintiff died, and a Bill of Revivor was brought, and before the Time for anſwering was out, or the Cauſe revived, the Plaintiff moved for an Injunction, to ſtay the Lord *Wharton*'s working the Mines, having Affidavits, that ſince the Verdict againſt him, he had treble the number of Workmen, and between that and *Candlemas* would work out the Mines, and an Injunction was granted, though the Cauſe was not revived. *Mich.* 1702, between *Robinſon* and Lord *Wharton*. *Bac. Eq. Ca.* 285. Ibidem.

Sometimes, pending the Suit, the Court will order a Party Poſſeſſion, by Injunction; or that the Rents, not already paid, ſhall be ſtayed in the Tenants Hands, until Hearing; and ſometimes will order both: At other Times will order a Receiver, who, upon good Security, ſhall take the Rents and Profits and pay them into Court, or account for

Injunction for Poſſeſſion ſometimes granted, pending the Suit, or the Rents to be paid into Court, and ſometimes both, and the Court will order a Receiver.

for them when the Court ſhall require; and he to enter into ſuch Recognizance as the Court directs, to ſecure his accounting for, and paying ſuch Rents into Court.

Tenant in Poſſeſſion, in what Caſes reſtrained from committing Waſte.

Although a Court of Equity will not aſſiſt a Forfeiture, yet the Tenant in Poſſeſſion ſhall be reſtrained in Equity, from committing Waſtes, in all Caſes in which Waſte is puniſhable by Law; and for this Purpoſe, an Injunction, it is ſaid, will in this Caſe be granted, before the Bill is filed: *Sed. Quær. vide* 4 *Inſt.* 92. 1 *Vern.* 156. Alſo an Injunction will be granted to ſtay Waſte, in Behalf of an Infant in *Ventre ſa mere.* Equity will likewiſe, in ſome particular Caſes, reſtrain the Tenant from committing Waſte, where it is diſpuniſhable by Law, either by the Nature of his Eſtate, or by expreſs Grant of *without Impeachment of Waſte:* But where by the Grant of the Parties the Leaſe is made, without Impeachment of Waſte; Equity will not reſtrain the Leſſee from cutting Timber, plowing, opening Mines, *&c.* though ſuch Leſſee ſhall be reſtrained from pulling down Houſes, defacing Seats, *&c.* *Hard.* 96. 1 *Ch. Rep.* 13, 14. 106. 116. 2 *Vern.* 263. 392, 711. *Salk.* 161. 2 *Ch. Ca.* 32. 2 *Ch. Rep.* 94. See *Bac. Eq. Ca.* 399. 2 *Vern.* 401.

A. Tenant for Life, Remainder to *B.* for Life with Reverſion, or Remainder in Fee; *A.* though diſpuniſhable of Waſte at Law, by Reaſon of the meſne Remainder for Life, ſhall be enjoined from committing Waſte, in a Court of Equity, for this is a particular Miſchief. 1 *Roll. Abridg.* 377. *Moor*, 554. *S. P.* 1 *Vern.* 23. *S. P.*

Tenant for Life, when enjoined from Waſte.

But Tenant for Life, without Impeachment of Waſte, ſhall not be enjoined from committing Waſte. 1 *Vern.* 23.

But not Tenant for Life, *ſans* Waſte.

A. on the Marriage of his Son, ſettles a Meſſuage to the Uſe of himſelf for Life, *ſans* Waſte, Remainder to his Son; though the Eſtate for Life of the Father be *ſans* Waſte, yet he cannot pull down the Houſe, nor commit any voluntary Waſte, and if he does, the Court will grant an Injunction; becauſe this is an Abuſe of the Power, and derogatory to the Grant, and will oblige him to put the Houſe in as good Repair, as it was before the Waſte committed; the Intent of the Privilege, being only in order to cut down Timber, and open new Mines. *Salk.* 161. 2 *Vern.* 738. 1 *Williams*, 528. 2 *Ch. Ca.* 32. *Preced. in Ch.* 454.

But Tenant for Life, *ſans* Waſte, cannot commit voluntary Waſte, in Abuſe of his Power, and derogatory to his Grant.

In the Caſe of the Biſhop of *London* againſt *Webb*, 1 *Williams*, 528, upon a

Leſſee for Years, *ſans* Waſte, enjoined from digging Bricks.

a Bill brought againſt the Defendant, who was a Leſſee for Years *ſans* Waſte, with Remainder in Fee to the Defendant, for an Injunction againſt digging the Ground for Bricks, Lord *Ch. Parker*, did enjoin the Defendant from further digging; for that it was deſtroying the Soil, and to the Ruin of the Inheritance, but gave the Defendant Leave to carry off the Bricks he had dug.

But may carry off the Bricks he has dug.

And ſhall enjoy the Trees, or the Materials of the Houſe he has pulled down.

In this Caſe it was mentioned, that it was hard, that the Leſſee for Years *ſans* Waſte, ſhould enjoy the Trees, or the Materials of the Houſe, when he pulls them down, for that before the Statute of *Glouceſter*, Waſte did not lie againſt a Leſſee for Years, and that being without Impeachment of Waſte, ſeems originally intended only to mean, that the Party ſhould not be puniſhable by that Statute, and not to give a Property in the Trees, or Materials of the Houſe; his Lordſhip agreed to this, but ſaid, that the Revolutions have eſtabliſhed the Law to be otherwiſe, his Lordſhip would not ſhake it, much leſs carry it further.

The Privilege of being *ſans* Waſte, will not intitle to commit voluntary Waſte.

The Privilege of being *ſans* Waſte, will not, in Equity, intitle the Leſſee for Years to pull down an Houſe, or even cut down Trees that are for the Ornament of the Houſe. 1 *Williams* 528. And it was declared by the Earl of *Nottingham*

tingham in *William* and *Day's* Caſe, 2 *Ch. Ca.* 32. that he would ſtop the pulling down of Houſes, or defacing a Seat by Tenant in Tail, after Poſſibility of Iſſue extinct, or by Tenant for Life though diſpuniſhable of Waſte by expreſs Grant, or by Truſt. *Sed vide Ca.* in Equity 16, where it is agreed by Lord Chancellor *Talbot*, that no Inſtance can be ſhewn, where a Tenant in Tail had been reſtrained from committing Waſte, by the Injunction of the Court.

If Tenant in Tail, or Tenant in Tail, after the poſſibility of Iſſue extinct, ſhall be reſtrained from committing Waſte.

If *A.* is Tenant for Life, Remainder to *B.* for Life, Remainder to the firſt and other Sons of *B.* in Tail Male, Remainder to *B.* in Tail, *&c.* and *B.* (before the Birth of any Son) brings a Bill againſt *A.* to ſtay Waſte, and *A.* demurs to this Bill, becauſe the Plaintiff had no right to the Trees, and none that had the Inheritance was Party; yet the Demurrer will be over-ruled, becauſe Waſte is to the Damage of the Publick, and *B.* is to take care of the Inheritance for his Children, if he has any, and has a particular Intereſt himſelf, in Caſe he comes to the Eſtate. *Trin.* 1700, between *Dayrell* and *Champneſs. Bac. Eq. Caſes*, 400. Ibidem.

On a Motion for an Injunction to ſtay a Jointreſs Tenant in Tail, after Poſſibility, *&c.* from committing Waſte, it was Ibidem.

was urged, that ſhe being a Jointreſs within the 11th *H.* 7th ought in Equity to be reſtrained from cutting Timber, that being Part of the Inheritance, which by the Statute ſhe is reſtrained from alienating, and the Court granted an Injunction againſt wilful Waſte in the ſite of the Houſe, and pulling down Houſes. *Hillary* 1701, between *Cook* and *Whaley*. *Ibidem*, 400.

Where a Woman is to have a Jointure of ſuch a yearly Value, the Court won't prohibit her from committing Waſte, to make up any defect of it.

But where a Jointreſs, who had a Covenant that her Jointure ſhould be of ſuch a yearly Value, which fell ſhort, though her Eſtate was not without Impeachment of Waſte, yet the Court would not prohibit her making Waſte, ſo far as to make up the Defect of her Jointure. *Mich.* 1689, between *Carew* and *Carew*. *Ibidem*, 400. *Sed Quær.* if an Action of Waſte be brought againſt her, if *Chancery* will injoin the Action.

Nor where a Remainder of an Eſtate in Fee, after an Eſtate for Life is deviſed to a Perſon paying Legacies.

A. Deviſed Lands, on which Timber was growing, to his Wife for Life; Remainder to *B.* in Fee, paying ſeveral Legacies within a limited Time, and in Default of Payment, the Remainder to *C.* he paying the Legacies; and on a Bill brought by *B.* the Court gave him Leave to cut Timber for the Payment of the Legacies, though it was oppoſed by the Tenant for Life, and the Deviſee over, he making Satisfaction to the Widow for breaking the Ground, by

Carriage

Carriage, Waſte, *&c. Trin.* 1690, between *Claxton* and *Claxton.* 2 *Vern.* 152.

So, where a Man created a Term for five Hundred Years in Truſt for himſelf and his Wife for Life, Remainder to Truſtees for Payment of Debts and Annuities, and by Will deviſed the Reverſion thereof to *A.* for Life without Impeachment of Waſte, Remainder to his firſt and other Sons in Tail Male, with Remainder over, and *A.* being in Want, the Court gave him Leave to cut down Timber to the value of five Hundred Pounds; though the Debts and Annuities were not paid, the Truſtees having no Power to ſell the Timber, the Debts being like to have a long Continuance, and there being a great Deal of decaying Timber on the Eſtate. *Hillary* 1690, between *Aſpinwall* and *Leigh*, 2 *Vern.* 218.

Tenant for Life in reverſion after a Term for Years, in Truſt for a Man and his Wife for Life, Remainder to Truſtees for payment of Debts, and Annuities, allowed to cut Timber for his Support.

The Tenants file a Bill againſt the Lord of the Manor, to reſtrain him from digging Brick-earth within the Waſte, in Prejudice of their Right of Common, and the Court refuſed an Injunction before Anſwer, becauſe the Soil is the Lord's, and the Plaintiffs did not ſwear, that he had not left them ſufficient Common. *Moſeley's Rep.* 172.

Injunction refuſed before Anſwer, to reſtrain the Lord from digging Brick-earth, in the Waſte, in prejudice of the right of Common, and why.

Bill brought to enjoin the Grantor of Commonage from overſtocking the Common, diſmiſſed.

A Man having granted Common in his Down, for one Hundred Sheep, and five Rams: The Bill complained the Grantor over-ſtocked the Common, ſo that the Plaintiff, the Grantee, could have no Benefit of the Grant, and prayed the Grantor might be enjoined not to overſtock, *&c.* upon Debate the Court diſmiſſed the Bill. 2 *Vern.* 116.

Leſſee ſtayed from doing Waſte, but not eaſily a Mortgagee, and how the Injunction is granted.

The Court will ſtay a Leſſee by Injunction from doing Waſte, but not eaſily a Mortgagee; and it is granted againſt thoſe only, who hold mediately or immediately, under him that prays it. *Chan. Ca.* 450.

Injunction to the Sheriff, on allowing Exceptions to the Anſwer to the Interrogatories.

On a poſſeſſory Bill, the Court have granted an Injunction to the Sheriff, on the Defendant's allowing Exceptions to his Anſwer, and perſonal Interrogatories for Inſufficiency but there muſt be Notice of the Motion. Earl of *Shelburn* and *Ennis* againſt *Aylmer*, the 8th of *July* 1760, which was the laſt of the eight Days. But ſee *Title Poſſeſſory Bills*.

The Proceedings on a breach of the Injunction.

As concerning the Breach of theſe Injunctions, and all Injunctions for Poſſeſſion, the Parties guilty thereof, are to be proceeded againſt, and to be puniſhed in the ſame Manner, as in other Caſes of Diſobedience to the Court,

or

or oppoſing or deſpiſing the Proceſs or Authority thereof. See *Title Contempts and Miſdemeanours.*

No breach of an Injunction on a Decree, if a Perſon, not a Party, diſturbs the Poſſeſſion.

But note, that although in an Injunction to put the Plaintiff in Poſſeſſion, on a Decree, there is always a Clauſe to quiet the Party from Time to Time, in the Poſſeſſion, yet it is no breach of the Injunction in any Perſon, who is not a Party to the Decree, to diſturb the Poſſeſſion, after the Poſſeſſion is given by the Sheriff on the Injunction, otherwiſe, a Man who was no Party to the Decree, and yet had a real Title to Land, might be for ever debarred from recovering or trying his Title. So determined in the *Exchequer*, in the Caſe of *Swan* againſt *Fitzimons*, *Eaſter* Term, 1743.

Poſſeſſory Bills, and the Injunctions thereon, on what founded.

From whence theſe poſſeſſory Bills, and the Injunctions thereon originally took their riſe, has been already mentioned, but the common Opinion being that they are founded on the Equity of the Statutes againſt forcible Entry, upon theſe Statutes it has been reſolved, that, to juſtify a forcible Detainer, there muſt be,

Lucas. 1. p. 364.

And the Requiſites to juſtify a forcible Detainer.

Firſt, A triennal uninterrupted Poſſeſſion. *Dyer* 141. b. *Pl.* 48.

Secondly, There must be a Title, either by Descent or Purchase; for confessedly, if there be not a Title, or if it appear plainly to be no other than a Disseizin, though the Party should be forty Years in Possession, he cannot justify a forcible Detainer against the Disseisee, after a Claim. *Lit. Sect.* 427. 430. 431.

And the Title must appear to be still in Being, and undetermined; for if it appears to be determined, the Party shall not justify a forcible Detainer, under a triennial Possession. *Cro. Jac.* 198. *Snigg* against *Skirton.*

But then it seems that the Justices cannot go into a Disquisition, touching the Goodness or Sufficiency of the Title, nor is the Validity of the Title; determined, upon an Indictment brought on these Statutes. 1 *Sid.* 149. the King against *Burgess. Cro. Jac.* 633.

Thirdly, The Party must shew a forcible Entry, or a forcible detainer. *Cro. Jac.* 199.

And these, it seems, are the Rules or Guide in Equity, where they restore and quiet a Possession against Force; and that he who might justify a forcible Detainer at Law, and no other, is proper

to

to be reſtored or quieted with Reſpect to Force in Equity.

By Stat. 8. *Geo.* 1. C. 2. S. 2. *Pars*, No Privilege of Parliament ſhall be allowed in any Suit for wilful Holding over of Lands, nor in any Suit or Motion to obtain any Injunction or Writ of Eſtrepement, to prevent Waſte.

No Privilege of Parliament in any Suit, or Motion for theſe Injunctions.

Of Injunctions to ſtay Suits and Proceedings at Law.

BY the 52d general Rule, no Injunction is to be granted to ſtay Suits at Law, upon Priority of Suits only, or upon the bare Surmiſe in the Bill, but on the Defendant's delay, or Contempt in not appearing, or anſwering; or in not perfectly anſwering, and the ſame appearing to the Court; or on Matter confeſſed in the Anſwer, Matter of Record, or Writing plainly appearing, or the Duty demanded very antient; or when a Bill is to be relieved againſt a Debt ſued for at Law, and it appears the Creditor and Debtor have been both dead for a conſiderable Time before the Action brought.

RULE. Injunctions to ſtay Suits at Law, in what Caſes granted.

RULE. Injunction after Verdict, on what Conditions.

By the 60th general Rule, where a Bill comes in after Verdict for a Debt, or otherwiſe, an Injunction is not to be granted without depoſiting the principal Money, except there appears to the Court in the Defendant's Anſwer, or by Deed under his Hand and Seal, or otherwiſe, good Matter of Relief in Equity.

Injunction on an Attachment, for not appearing or anſwering, and on the Defendant's praying a *Dedimus*.

If the Defendant doth not appear, or anſwer, in Time, when the Plaintiff hath entered an Attachment againſt him, he may then give Inſtructions to Counſel to move thereon for an Injunction, which is granted of courſe: Or if the Defendant prays a *Dedimus* to take his Anſwer, or moves for Time to anſwer, the Plaintiff may enter an Order of courſe, for an Injunction to ſtay the Defendant's Suit at Law, (if any be) till the Anſwer comes in. See *Title Anſwer*. And the Injunction is to be taken out, and ſerved upon the oppoſite Party, and his Attorney or Agent, in eight Days after the Rule is entered for the Injunction, or the Defendant may proceed at Law, notwithſtanding the Rule.

The Injunction to be ſerved in eight Days after the Rule, or the Plaintiff at Law, may proceed.

Injunction where a Defendant refers to the Anſwer of another Defendant in Contempt.

If the Defendant againſt whom the Injunction is prayed, refers to the Anſwer of another Defendant, who is in Contempt, that is a ſufficient Ground to grant an Injunction.

Theſe

The Court will not ſtop a Trial, where the Plaintiff is ready for it; but will ſtop the Defendant after Verdict.

Theſe Injunctions are only granted until Anſwer or further Order; but if the Bill was filed after Iſſue joined at Law, the Court, upon Motion of the Defendant's Counſel, will give the Defendant leave to try his Action at Law, but to ſtop after Verdict.

Bill before Iſſue joined to ſtop Proceedings at Law, injunction granted, until Anſwer.

And it ſeems to be the general Practice, that if a Bill be filed for an Injunction, to ſtop proceedings at Law, before Iſſue is joined; the Plaintiff at Law ſhall be ſtopped from proceeding to Trial, until he ſhall have fully anſwered the Bill, as it may be, that the Defendant at Law, who is Plaintiff in Equity, cannot with Safety proceed to Trial, without ſuch Evidence as it may be, can only be had from the Anſwer of the Defendant. But if no ſuch Fatality appears in the Caſe, or if it ſhall appear from the Plaintiff's own Shewing by his Bill, or otherwiſe, that he either admits, or does not controvert the Title of the Plaintiff at Law, to the Matter in Queſtion; the Court will on Motion, give the Plaintiff at Law Liberty to go to Trial, notwithſtanding the Injunction: But if the Defendant at Law, will conſent to Judgment, with Releaſe of Error, they will ſtop the Plaintiff until the Hearing of the Cauſe, or further Order of the Court. It was ſo determined in the Caſe of *Newcomen* and *Newcomen* againſt *Walker*, in this Court,

the 7th of *July* 1757, where the Defendant *Walker* having brought an Ejectment for Non-payment of Rent, the Plaintiffs before Iſſue joined, filed a Bill with an Affidavit annexed, purſuant to the Statute, for an Injunction againſt the Defendant's Proceedings at Law: And in their Bill admitted the Demiſe, a conſtant Poſſeſſion under it, and upwards of a year's Rent due when the Ejectment was brought; but charged that the Defendant's Title to the Inheritance of the Land, had been conteſted by a third Perſon. And on ſolemn Debate, an Order was made to the above purpoſe.

And on the above Motion, it was mentioned by Mr. *A. Malone*, that the Reaſon why an Injunction is granted until Hearing, or further Order, is, that the Plaintiff at Law, who is the Defendant in Equity, might on the Coming in of his Anſwer, diſſolve the Injunction, and iſſue Execution on the Judgment, before the Cauſe could come before the Court, upon the Bill.

If the Plaintiff at Law be not ready for a Trial, the Injunction will ſtop him.

But if the Defendant be ſerved with ſuch Injunction, and he has not arreſted the Plaintiff in Equity, nor filed his Declaration, he cannot, after having been ſerved with ſuch Injunction, arreſt the Plaintiff, nor file a Declaration; if he does, until after Anſwer, or further Order of the Court, he is guilty of the breach of ſuch

ſuch Injunction, and the Court will commit him.

RULE. Proceedings to diſſolve the Injunction.

By the 61ſt general Rule, where an Injunction is granted, until Anſwer or further Order, to ſtop a Suit at Common Law; the Plaintiff at Law may immediately, upon filing the Anſwer, enter the firſt Rule of courſe, to diſſolve the Injunction; without giving Notice to the Attorney on the other ſide; and thereupon, four Days ſhall be given the Plaintiff in Equity, to ſhew Cauſe after ſervice of the Order; and if no Cauſe be then ſhewn, upon Certificate thereof, and on Affidavit of the Service of the Order, and upon Motion of the Defendant's Counſel thereon, the Injunction ſhall be diſſolved.

Cauſes againſt diſſolving the Injunction.

But if the Contempts (if any) be not cleared (that is, the Coſts paid), and all Equity denied in the Anſwer; or if Exceptions be put in to the Anſwer for Inſufficiency, any of theſe are good Cauſes againſt diſſolving the Injunction; alſo, if there be two Defendants, againſt whom an Injunction is obtained, the Court will ſeldom diſſolve the Injunction, until both have anſwered.

Exceptions to an Anſwer, before a Report, a Cauſe for continuing, not for obtaining an Injunction.

Exceptions to an Anſwer, without a Report of it's inſufficiency, are not a ſufficient Cauſe for obtaining an Injunction; becauſe they are often put in for Delay,

Delay, yet an Injunction may be continued on Exceptions.

RULE. Injunction granted on Report of a ſhort Anſwer.

By the 75th general Rule, where an Anſwer is reported by a Baron to be ſhort, upon Motion, in ſuch Caſes, the Court will grant an Injunction to ſtay the Defendant's Proceedings at Common Law, until he makes a full Anſwer, or further Order.

Injunction on the Merits, or an Equity confeſſed.

Although the Defendant ſhould appear, and anſwer in Time, yet the Plaintiff may apply to the Court for an Injunction upon the Merits; in which Caſe, you muſt draw a Brief of the Pleadings for Counſel, and give a proper Notice in Writing, of the Motion for ſuch Injunction, to the Defendant's Attorney; and if it ſhall appear from the Defendant's Anſwer, that the Plaintiff hath Equity on his Side, or his Caſe ſeems hard, the Court will grant him an Injunction.

Injunctions on the Merits, generally ſtand till Hearing.

And Injunctions granted upon the Merits, or ſome ſpecial Cauſe of Equity, commonly ſtand until the Hearing; nor will the Court eaſily diſſolve them, unleſs the Plaintiff be guilty of ſome unreaſonable Delay in his Proceedings; and although the Injunction be diſſolved, yet the Court will ſometimes upon Motion, revive it, eſpecially where Equity appears evident with the Plaintiff, or his Caſe

Caſe is hard. But when an Injunction is thus granted on the Merits, the Court generally put ſome Terms upon the Plaintiff, as bringing in the Money; or paying it to the Party ſubject to the Order of Court; or giving Judgment with a releaſe of Errors, and conſenting to bring no Writ of Error; or to give Security to abide the Order on the Hearing, or the like; and to this Order is generally added a Clauſe, that the Plaintiff ſhall ſpeed his Cauſe to a Hearing.

But in ſuch Caſe, the Court generally lay ſome Terms on the Plaintiff.

RULE.

Injunction to ſtay Executions, &c. not to be granted without ſpecial Order.

By the 62d general Rule, no Injunction ſhall be granted without ſpecial Order, and expreſs Words, to hinder any Extent or Execution actually upon the Land, or to hinder the Defendant from proceeding at Law, to evict the Plaintiff, nor from making any Leaſe, peaceable Entry, or ſingle Diſtreſs for that End.

Injunctions granted or continued upon giving Judgment at Law, or other Terms.

In moſt Caſes the Court have been inclinable to grant or continue Injunctions upon the Plaintiff's giving Judgment at Law, with Releaſe of Errors, ſpeeding the Cauſe, or ſome ſuch Terms, to make the Defendant ſafe; but the beſt Way is, to bind the Defendant by Order to bring no Writ of Error, for otherwiſe, he may notwithſtanding bring a Writ of Error, and ſo delay Time, as if no releaſe of Errors had been given. See 1 *Vern.* 120.

It

Plaintiff may apply for an Injunction on the Merits, after the Anſwer is reported ſufficient.

It has been doubted, whether, as the Plaintiff undertakes to procure a Report of the Inſufficiency of the Anſwer, and it being found againſt him, he ſhall afterwards ſhew Cauſe on the Merits; there ſeems no Foundation for ſuch an Objection, and it would be extremely ſevere if it ſhould be admitted; for the Plaintiff's Counſel may think the Anſwer not full, and yet may be miſtaken: And notwithſtanding this, the Plaintiff may have good Cauſe on the Merits for Continuance of his Injunction, and he ought to be admitted to ſhew it: But this muſt be done on Notice given to the other Side, he cannot do it when the Defendant's Counſel comes to move to diſſolve the Injunction, on the Anſwer being reported ſufficient; becauſe as this is a Motion of courſe, the Defendant's Counſel is not prepared to ſpeak to the Merits; but he may, and ought to have Liberty to do it on Notice given.

But Notice muſt be given thereof.

If the Defendant ſwears a certain Sum due to him, the Plaintiff is to depoſite the Sum if he gets an Injunction.

Generally, when a Defendant in his Anſwer ſwears a certain Sum due, the Court will not grant the Plaintiff an Injunction without depoſiting the Sum; and in ſome Caſes the Court have admitted the Defendant to make Affidavit of what was due to him, and have granted the Plaintiff an Injunction upon

on depoſiting the Sum, and not otherwiſe.

In ſome Caſes, the Court have taken Security for the Money, to be approved of by a Baron, and have ſometimes refuſed it; but this is according to the Circumſtances attending the Caſe, the Security is to be by Recognizance before the Chief Baron.

Security ſometimes taken, and ſometimes refuſed.

Where an Injunction is to ſtop Proceedings at Law, and the ſame is gone by the Death of the Party, Motion muſt be made (upon Notice given) to proceed at Law; and it is ſaid, that regularly, in all Caſes where an Injunction is diſſolved, a Motion of courſe ſhould be made for Liberty to proceed.

Injunction if gone, or diſſolved, a Motion muſt be granted to proceed at Law.

Where a Bill is filed for an Injunction to ſtop Proceedings at Law, and the Defendant neglects to appear in due Time, after the Return of the *Subpæna*, or to Anſwer in due Time after ſuch Appearance, the Plaintiff may enter an Attachment, and move by his Counſel thereon for an Injunction, which the Court will grant him; and after obtaining ſuch Injunction, the Plaintiff's Attorney may move the Court, to go on with the Proceſs of Contempt notwithſtanding the Injunction, and the Court will make an Order for that Purpoſe.

Injunction on Attachment for not appearing, or anſwering in Time.

Plaintiff may go on with the Proceſs, firſt obtaining an Order for that Purpoſe.

When

On theſe Injunctions a Recognizance to be entered into, and the Purpoſes thereof.

When theſe Injunctions are granted, there ought to be a Recognizance entered into by the Plaintiff, that he ſhall not diſmiſs his Bill, and if the Cauſe abates, that he ſhall revive, and pay what ſhall be decreed.

After Injunction, if the Plaintiff would amend his Bill, he ſhould obtain an Order for that Purpoſe, without Prejudice to the Injunction.

In all Caſes where the Plaintiff hath obtained an Injunction, and that it is neceſſary to amend his Bill, he ſhould firſt move the Court by his Attorney, for Liberty to amend the Bill without prejudice to the Injunction, and the Court will thereupon make an Order for that Purpoſe. See *Title Amended Bill.*

But if the Bill be amended to continue, or obtain an Injunction on Equity confeſſed, the Facts muſt be verified by Affidavit.

But where the Plaintiff amends his Bill, to continue, or obtain an Injunction on Equity confeſſed, this is always looked upon as a Dilatory, and the Court will take no Notice of the Charges or Allegations, added by the Amendment, unleſs the Plaintiff files an Affidavit, verifying ſuch additional Allegations that they are material, and came to his Knowledge ſince the filing of the original Bill: So ordered, in the Caſes of *Baily* againſt *Barnewall*, in the *Exchequer*, *July* 1743; *Barry* againſt *Graham*, and another *May*, 1757, and *Hickſon* againſt the Earl of *Shelburn*, *June* 1758.

Though

Though the Court will not proceed againſt a Member of Parliament, during Privilege, yet if a Parliament Man ſues at Law, and a Bill is brought here to be relieved againſt that Action, the Court will make an Order to ſtay Proceedings at Law until Anſwer, or further Order. 1 *Vern.* 329.

The Court will grant an Injunction againſt a Member of Parliament to ſtop his Proceedings at Law.

An Injunction does not prevent an Entry. 2 *Vern.* 519.

Injunction prevents not an Entry.

On a Bill brought to ſet aſide a Will of a perſonal Eſtate for Fraud, the Court denied an Injunction to ſtay the Probate thereof, for that the ſpiritual Court has Juriſdiction of Fraud, relating to a Will of a perſonal Eſtate, and can examine the Perſons by way of Allegation touching the Fraud. 2 *Williams*, 287.

Bill brought to ſet aſide a Will of a Perſonal Eſtate for Fraud, the Court will deny an Injunction to ſtay the probate thereof.

An Injunction upon an Attachment, or upon a *Dedimus*, or upon the Defendant's praying Time, doth not extend to ſtay Proceedings in the ſpiritual Court, as it does to ſtay Proceedings at Law; ſo that when ever Proceedings in the ſpiritual Court are to be ſtayed, it is to be moved ſpecially. *Quære*, whether the ſame Rule does not hold with Regard to Proceedings in the Court of Admiralty. 1 *Williams*, 301. But the Court will grant an Injunction to

Injunction upon an Attachment, or *Dedimus*, *&c.* does not ſtay Proceedings in the ſpiritual Court, without ſpecial Order.

But the Court will grant an Injunction to reſtrain the Execu-

for from receiving the Aſſets, before Anſwer.

to the Executor to reſtrain him from receiving the Aſſets before Anſwer, when a Suit is depending in the ſpiritual Court to ſet aſide a Will, becauſe that Court cannot impound the Effects *pendente Lite*. *Moſeleys Rep.* 236.

Injunction to ſtop Proceedings at Law, and in the ſpiritual Court.

In the Caſe of *Henry* and others againſt *Baxter* and others, in this Court, in *Trinity* Term 1749, the Defendants having moved for Time to anſwer, the Court, upon Counſel's Motion, and on producing a Copy of the Order for Time to Anſwer, granted an Injunction to ſtop Proceedings at Law and in the the ſpiritual Court, the Bill being filed for Diſcovery of a Will, which was ſuppreſſed, and the Defendants were proceeding to prove a former Will in the ſpiritual Court.

Injunction not always diſſolved, where a Plea or Demurrer is argued and allowed.

When a Plea or Demurrer is argued by Counſel and allowed, there is generally, though not always, an End of the Injunction; for ſome Equity may be ſhewn for continuing, it ariſing out of the Defendant's Anſwer put in with ſuch a Plea or Demurrer; and upon a Plea or Demurrer being allowed, or on coming in of the Anſwer, the Court will not abſolutely diſſolve the Injunction on the firſt Motion, though upon Affidavit of Notice, but only *Niſi*; thereby giving the Plaintiff liberty to ſhew Cauſe

Cauſe againſt diſſolving the Injunction. 1 *Harriſon's Chan. Pract.* 3d Edit. *Vol.* 1. 212.

As by the 59th Rule, the Plaintiff ſhall be entitled to an Injunction, if the Defendant ſhall be guilty of any Delay in not anſwering, or in not perfectly anſwering the Plaintiff's Bill: Therefor if the Defendant ſhall demur to the Bill, or put in any Plea to the ſame, or to any Part thereof, which ſhall appear to be a Dilatory, the Court upon a Motion of Counſel for the Plaintiff, on the Coming in of ſuch Plea, or Demurrer, (Notice thereof being firſt given to the Defendant,) will grant an Injunction to ſtop the Defendant's Proceedings at Law, until the Plea or Demurrer be diſpoſed of; but if the Plea ſhall appear to be to the Right, and not as a Dilatory, in ſuch Caſe, the Court will be very cautious how they grant an Injunction to the Plaintiff upon ſuch Plea. See the Caſe of Lord *Howth* againſt Lady *Howth*, in *Chancery*, *Trinity* Term, 1752, on a Petition. Injunction on a Plea or Demurrer.

It is ſaid in *Harriſon's Chan. Pract. Vol.* 1. Pa. 212, that an Injunction has been refuſed whilſt a Plea, or Demurrer was depending; for that until it be argued, it appears not whether the Injunction ſaid to be refuſed whilſt a Plea or Demurrer was depending.

Court has Cognizance of the Cauſe. See *Bunb. Rep.* 11.

Plea ordered to ſtand for an Anſwer, Defendant can only as in Caſe of an Anſwer, move to diſſolve the Injunction.

If a Plea is ordered to ſtand for an Anſwer, the Defendant cannot move to diſſolve the Injunction abſolutely, but only *niſi*, as on coming in of an Anſwer. *Moſeley's Rep.* 198.

RULE. Injunction to be taken out in eight Days after the Order, and to ſtay Proceedings at Law, a Certificate of Proceedings is to be produced. *Quær.*

By the 63d general Rule, in all Caſes of Injunctions, the ſame is to be taken out in eight Days, and the Party is to be ſerved therewith, and if it be to ſtay Proceedings at Law, the Attorney is not to move without a * Certificate how far the ſame hath proceeded, and if he that obtains the ſame, delay Proceedings in bringing the Cauſe to a Hearing, the Court will take that for a good Ground to diſſolve the Injunction.

Injunctions how to be ſerved.

An Injunction is ſerved by ſhewing it under Seal, and delivering a true Copy thereof to the Party, and the Service muſt be either on the Party himſelf, or his Attorney, Sollicitor, *&c.* or ſuch of them as can be found, or as the Caſe may require: But it has been held that leaving it with the Attorney's, or Sollicitor's Clerk, or Servant, is good Service,

* It is not now practiſed to produce a Certificate of the Proceedings at Law, though this Part of the Rule ſeems very proper and reaſonable.

Service, and this is the Method of ſerving Injunctions, in all Caſes.

The Injunction itſelf need not be delivered to be compared.

And if the Injunction be ſhewn, and a Copy delivered, the Party ſerving it is not bound to deliver the Injunction it ſelf to be compared. *Chan. Ch.* 203, *Woodward* and *King.*

Attachment for breach of the Injunction by Proceeding a Law unleſs Cauſe.

If the Party, or his Attorney proceed at Law after Service of the Injunction to ſtay Proceedings, on Affidavit ſworn and filed of the Service thereof, and on Counſel's Motion thereon, (without Notice) the Court will grant an Attachment againſt the Party, for Breach of the ſaid Injunction.

If no Cauſe ſhewn, the Order is made abſolute.

If the Party is not prepared to defend ſuch Motion, the Court uſually gives him a Day to ſhew Cauſe againſt ſuch Motion; and then upon Hearing the Affidavits on both ſides, the Court uſually decides whether the Party is guilty of the Breach of the Injunction or not, and if he be, the Court will make the Order for the Attachment abſolute.

The Attachment is to be directed to the Purſuivant, and Party to pay Coſts, and ſometimes to make Reſtitution.

And the Attachment in this Caſe is directed to the Purſuivant of this Court; and when the Party in Contempt is arreſted thereon, he is to remain in Cuſtody, until he has paid the adverſe

Party his Coſts, and begs Pardon of the Court; and ſometimes until he has made Reſtitution to him, for the Damages he might have ſuſtained for Breach of the ſaid Injunction: But if the Court be of Opinion, that the Party ſo charged with the Breach of the Injunction is not guilty, he ſhall be acquitted with Coſts.

Irregular Injunction may be ſet aſide.

Although an Injunction be irregularly obtained it ought to be obeyed, or the Party is in Contempt. 2 *Cha. Ca.* 203: But an Injunction irregularly iſſued, may be ſet aſide upon Motion: And in ſome Caſes, the Court will, upon Motion, refer the Irregularity of iſſuing the Injunction to the Officer.

The Court adjudged the Anſwer inſufficient, and yet gave Defendant leave to aſcertain his Debt at Law; notwithſtanding the Injunction, becauſe he had ſworn eight Hundred Pound due to him, and could not put in an Anſwer from *Conſtantinople*, where he reſided, in leſs than two Years.

In the Caſe of *Hornby* againſt *Pemberton*, *Michaelmas* Term 1728, *Moſeley's Rep.* 57, the Anſwer being judged inſufficient, by the Courſe of the Court, the Injunction was to continue, and the Defendant in the croſs Cauſe was not obliged to anſwer, until the Defendant in the original Cauſe had put in a ſufficient Anſwer: But the Defendant having ſworn in his Anſwer, that eight Hundred Pound was really due to him, and not being able to put in a further Anſwer from *Conſtantinople*, where he then reſided, in leſs than two Years, the Court ordered, that the allowing the Exception ſhould not hinder

hinder the Defendant from getting an Anſwer to his croſs Bill, and that he might proceed at Law, ſo far as to aſcertain his Debt notwithſtanding the Injunction.

Bailiffs who had ſerved an Execution, in breach of an Injunction, find Money hid in the Plaintiff's Houſe, and carry it away, and do great ſpoil to the Plaintiff's Goods, on Application to the Court, an Order was made, that the Defendant ſhould make good his Money to the Plaintiff, and ſhould ſatisfy all other Damages, which the Plaintiff would ſwear he had ſuſtained. 1 *Vern.* 267.

Bailiffs who had ſerved an Execution in breach of an Injunction, find Money hid in the Houſe, and carry it away, and do Spoil to the Goods. Party at whoſe Suit the Execution was ordered to make Satisfaction.

By 5 *Geo.* 2. *Cha.* 4. *pars*, on any Ejectment, Diſtreſs or Action for Rent, if the Tenant files a Bill for an Injunction, it ſhall not iſſue for Want of an Anſwer, unleſs the Plaintiff ſhall verify by Affidavit, the material Allegations of his Bill.

Upon a Bill for an Injunction againſt an Ejectment, Diſtreſs, or Action for Rent, the Facts muſt be verified by Affidavit.

Now by the Words of this Act, it would ſeem as if a general Affidavit, That the material Allegations of the Bill were true, would be ſufficient: But this would be making the Party, and not the Court, a Judge of what was material; beſides, upon ſuch an Affidavit, the Party could not be indicted for Perjury, if he ſwore falſely; wherefore, theſe Words are conſtrued largely, and equitably; and the material Allegations in the Bill, muſt

The material Facts in the Bill, to be particularly ſet forth in the Affidavit.

be ſet forth particularly in the Affidavit, that the Court may judge thereof. So determined in the Caſe of *Scot* againſt *Boyle*, in *Chancery*, 27th *July* 1749.

But if the Defendant anſwers, and it is reported inſufficient, the Plaintiff ſhall have an Injunction, although he had not made ſuch Affidavit.

And in this Caſe, Mr. *Stannard* ſaid, and it was agreed to by the Court, That if the Defendant put in an Anſwer, which upon Exceptions, ſhould be reported inſufficient, that the Plaintiff would be intitled to an Injunction, although he had not verified the material Allegations of the Bill by Affidavit, purſuant to the Statute; for that by the Defendant's anſwering, it appeared he had ſufficient Opportunity to make his Defence. It was objected in this Caſe, that the Injunction was originally obtained for Want of an Appearance, and not for Want of an Anſwer, but this was thought to be a Diſtinction without a Difference.

No Difference in this Caſe, between an Injunction for want of an Appearance, or an Injunction for want of an Anſwer.

In Caſe of Abatement a Motion to be made to oblige the Party to revive, or the Injunction to be diſſolved.

Where an Injunction abates, by the Death of either Plaintiff or Defendant, the Court ſhould be moved to oblige the Party for whoſe Benefit it is, to revive within a ſtated Time, or the Injunction to be diſſolved. 1 *Har. Cha. Pract.* Vol. 1. 218.

An Injunction to ſtop proceedings at Law, prevents the Statute of Limitation from being pleaded,

If proceedings at Law be ſtayed by the Injunction of this Court, the Court will preſerve the Plaintiff's Right, and will not ſuffer the Statute of Limitations to be pleaded

pleaded in Bar to his Demand. 2 *Chan. Ca.* 217.

There is another Injunction called a perpetual Injunction, for quieting a Man in the Poſſeſſion of his Eſtate, and for preventing Multiplicity of Suits, where one, two, or more Verdicts, are gone againſt a Man. This Injunction is to quiet the Plaintiff, and his Heirs for ever, and all claiming by, from and under him, and this is very often granted, and in many Inſtances the Juſtice of the Court calls for it.

A perpetual Injunction to quiet a Man in poſſeſſion of his Eſtate, or to prevent Multiplicity of Suits.

So where many Suits are depending, and are likely to happen from one and the ſame Cauſe, the Court will here interpoſe, and grant an Injunction; they will direct a proper Iſſue to try the whole, and all the reſt ſhall be bound by the Verdict; or elſe there might be twenty Actions, and as many Verdicts, where one proper Direction or Iſſue ends the whole; and it is only directing one Iſſue to prevent many more. For more of theſe perpetual Injunctions, ſee *Bills of Peace*, under Title *Bills*.

Ibidem.

On a Bill taken *pro confeſſo*, by Reaſon of the Defendant's Contempt in ſtanding out all Proceſs, if it prays an Injunction to quiet Poſſeſſion, or to ſtay proceedings at Law, the Court will decree a perpetual one. See *Harriſon's Chan. Pract.* Vol. 1. 216.

Perpetual Injunction on a Bill taken *pro confeſſo*, if prayed.

Injunctions for Poſſeſſion before Hearing, ſtop not Suits at Law.

It is ſaid that Injunctions for Poſſeſſion, before Hearing, hinder not the Defendant's Suit at Law, making a Leaſe, taking a Diſtreſs, *&c.* and it may be diſſolved on Cauſe ſhewn, as Injunctions in other Caſes. *Ibidem.*

Special Injunction when prayed by the Bill, to be moved for by Counſel, and the Court will ſettle the Injunction.

Where a ſpecial Injunction is prayed by the Bill, and that the Plaintiff is intitled thereto, on the Defendant's getting Time to Anſwer, or on a Rule being entered for a *Dedimus*, there muſt be a Motion made by Counſel, on behalf of the Plaintiff, (but without Notice) for an Injunction according to the Prayer of the Bill, and thereupon the Court will direct the prayer of the Bill to be read, and will order the Injunction in ſuch Manner as they ſhall judge proper. See *Gordon* againſt *Auſten* and others, in this Court, *Hillary* 1754.

If Exceptions be taken to an Anſwer to a Bill for an Injunction, and the Exceptions are allowed, the Court will grant an Injunction.

Where a Bill is for an Injunction to ſtop Proceedings at Law, and the Defendant anſwers, and Exceptions are taken thereto for being ſhort and inſufficient, and the Defendant allows the Exceptions; in this Caſe, the Plaintiff ſhall have an Injunction as upon a Baron's Report of a ſhort Anſwer.

So if a further Anſwer be put in, before the Exceptions can be referred.

So if the Defendant ſhould put in a further Anſwer, before the Exceptions can by the courſe of the Court be referred,

ferred, the Plaintiff ſhall, upon Counſel's Motion, (Notice being firſt given) and producing a Certificate of the Proceedings, have an Injunction; for the further Anſwer is a full Admiſſion, that the firſt is ſhort, without entering a Rule for allowing the Exceptions. And it is ſaid, that this Caſe is much ſtronger than a Baron's Report, before it is confirmed; beſides, the ſecond Anſwer may be as ſhort as the firſt, and only an Artifice to prevent the Plaintiff from obtaining an Injunction. *Rogers* againſt *Dwyer*, *Eaſter* Term, 1759, and *Hudſon* againſt *Wainright*, 8th *July* 1760, both in this Court, but neither of them on Debate*.

So where Exceptions are put in to continue an Injunction, and they are over-ruled, the Injunction is diſſolved of courſe, without a Motion.

Exceptions over-ruled, Injunction is diſſolved without Motion.

It

* This ſeems now to be the ſettled Practice in this Court, and in the Court of *Chancery*, upon ſuch further Anſwer the Injunction is of courſe. And yet, if this Practice is to be ſtrictly adhered to in all Caſes, it may be attended with great Injury to the Plaintiff at Law, who may be deprived of his juſt Demand, for ſome, perhaps, immaterial inſufficiency, or ſhortneſs in his Anſwer. Suppoſe he hath therein ſworn, that a real certain Sum is due to him? It is to be wiſhed that no Injunction was to be granted, to ſtop Proceedings at Law, in any Caſe whatſoever, unleſs the Plaintiff verified by Affidavit, the material Allegations in his Bill.

Defendant muſt ſign his Anſwer, or Injunction may be continued.

It was agreed *per Curiam*, that a Defendant ought to ſign his Anſwer, or for ſuch Defect, an Injunction may be continued; but *Quær.* if the Plaintiff takes a Copy of the Anſwer, whether it be not a Waiver of that in formality? *Bunb. Rep.* 251.

Injunction if granted on Exceptions to the Defendant's Anſwer.

It is ſaid an Injunction has been granted, merely on Exceptions being taken to Defendant's Anſwer, and has been refuſed according to the Circumſtances: But where it is granted, the Circumſtances muſt be very ſtrong, and full Notice given. *Sed Quær.* See *Bunb. Rep.* 116.

On Bill filed for an Injunction, to ſtop proceedings at Law, on an Ejectment, Injunction not to be granted, but on Plaintiff's lodging the Arrears ſworn to be due, and the taxed Coſts.

By Stat. 11. and Ch. 2. S. 4, and by 4 *Geo.* 1. C. 5. S. 4, where an Ejectment is brought for Non-payment of Rent, purſuant to the ſaid Statutes, if the Leſſee or other Perſon, claiming any Right to the ſaid Leaſe, ſhall within ſix Calendar Months after Execution executed, file one or more Bill or Bills, for Relief, in any Court of Equity, ſuch Perſon ſhall not have, or continue, any Injunction againſt the Proceedings at Law, on ſuch Ejectment, unleſs he ſhall within forty Days, next after a full Anſwer by the Leſſor of the Plaintiff in ſuch Ejectment, bring into Court, and lodge with the proper Officer, ſuch Sum and Sums of Money as the Leſſor of the Plaintiff

Plaintiff in the ſaid Ejectment ſhall in his Anſwer, ſwear to be due and in Arrear, over and above all juſt Allowances; and alſo, the Coſts taxed in the ſaid Suit, there to remain until the Hearing of the Cauſe, or to be paid out to the Leſſor or Landlord, on good Security, ſubject to the Decree of the Court.

The Leſſor of the Plaintiff entering, to account for no more than he made of the Premiſſes, without Fraud or wilful Default.

And in Caſe ſuch Bill ſhall be filed within the Time aforeſaid, and after Execution executed, the Leſſor of the Plaintiff ſhall be accountable only for ſo much, and no more, as he ſhall really and *bona Fide*, without Fraud or wilful Neglect, make of the demiſed Premiſſes, from the Time of his entering into the actual Poſſeſſion thereof. And if what ſhall be ſo made by the Leſſor of the Plaintiff, happen to be leſs than the Rent reſerved on the ſaid Leaſe, then the ſaid Leſſee or Aſſignee, before he ſhall be reſtored to his Poſſeſſion, ſhall pay ſuch Leſſor or Landlord, what the Money, ſo by them made, fell ſhort of the reſerved Rent, for the Time ſuch Leſſor or Landlord held the ſaid Lands.

Tenant to pay the Deficiency of the Rent, if any, whilſt the Landlord held the Lands.

No Injunction for Want of an Anſwer againſt proceedings in Ejectment, unleſs Plaintiff verifies by Affidavit the material Allegations in his Bill.

And by Stat. 5 *Geo.* Ch. 4. S. 5, on any Ejectment, Diſtreſs or Action for Rent, if the Tenant files a Bill for an Injunction, it ſhall not iſſue for Want of an Anſwer, unleſs the Plaintiff ſhall verify

rify by Affidavit the material Allegations of his Bill.

Interrogatories, Examination of Witneſſes, Depoſitions, and Publication.

Interrogatories what.

INTERROGATORIES are Queſtions exhibited in Writing by the Party, Plaintiff or Defendant, or directed by the Court to be propoſed to, and aſked of the Witneſſes in a Cauſe, touching the Merits thereof; or ſome incident therein. Alſo, Interrogatories are touching Contempts of Writs, Proceſſes, and Orders of Court; whereupon the Party offending is to be examined, concerning ſuch Contempt. See before *Title Contempts, &c.*

Both Plaintiff and Defendant, may exhibit Interrogatories, and croſs Interrogatories.

As on Hearings upon Bill and Anſwer, no Evidence is to be admitted, (except Matters of Record) but what ariſes from the Bill and Anſwer itſelf; ſo, when the Parties proceed to the examination of Witneſſes, the Cauſe is determined by ſuch Evidence as ariſes from the Depoſitions of Witneſſes, examined upon Interrogatories. And both the Plaintiff and Defendant may ordinarily exhibit Interrogatories; for when Parties are at Iſſue, it is neceſſary to conſider as well what the

the other Side may examine unto, as what ourſelves can prove, and ſo counter or croſs Interrogatories may be prepared, if there be Occaſion.

And by the Civil and Canon Law, it was abſolutely neceſſary, that there ſhould be a Citation taken out againſt the Defendant, previous to the Examination of Witneſſes; and the Reaſon is, that the Defendant, if cited, might either examine, or object to their Credibility, or put ſuch croſs Interrogatories to them, as might bring out Circumſtances in his Favour, which he would not have an Opportunity of doing, if he was not cited, but it was not neceſſary for the Defendant to appear, becauſe the Citation is in his favour, and he might, if he pleaſed, renounce a Privilege introduced in his favour.

At the Civil Law, a Citation was taken out, previous to the Examination.

Hence it is, that in *Chancery*, after the Plaintiff has replied to the Defendant's Anſwer, before he proceeds to examine any Witneſſes, he muſt take out a *Subpœna* againſt the Defendant to rejoin; but if the Plaintiff ſerves the Defendant with a *Subpœna* to rejoin, before he has filed a Replication, the Defendant appearing upon ſuch *Subpœna*, ſhall have his Coſts taxed; becauſe, the Plaintiff had not cloſed the Conteſt of the Anſwer, before he ſerved the *Subpœna* to rejoin.

Analagous to it in Equity, a *Subpœna* to rejoin Iſſues.

But if ſerved before Plaintiff replies, he ſhall pay Coſts.

Accord-

Interrogatoties how exhibited at the Civil Law, and the Proceedings thereon.

According to the antient Account of the Civil Law, it is very plain, that one of the Judges of the Court himself examined, and therefore he might form the Interrogatories out of the *Libellus articulatus*, as he pleased: but the Actor was at liberty to exhibit Interrogatories, founded upon the Articles, if he thought proper, but not of Necessity: But if any Interrogatories were exhibited, not founded on the Articles, the Depositions taken upon them, were to no Purpose.

Ibidem.

But if the adverse Party was advised to cross-examine the Witnesses, he was to exhibit the Interrogatories for the Judge to examine upon; because the Matter upon which the Defendant might cross-examine to invalidate, might not be within the Articles. But no Copies of the Interrogatories were to be given to the adverse Party. *Gail*, 194. 5 *Maranta*, 273, *&c. Dig. Lib.* 22. *Tit.* 5. *S.* 3. *de Test.* pa. 728.

Ibidem.

When the Judge thus examined upon the Articles, and the Interrogatories exhibited by the Parties, he was to consider, whether the Witnesses answered readily, or whether they brought a Story formed to him: But the Depositions thus taken before the Judge were to be kept secret, until Publication had passed in the Cause. *Corvin. de Test. Lib.* 22. *Tit.* 5.

This

This was the antient Courſe of the Civil Law, and no doubt in our *Chancery* Proceedings, the Witneſſes were formerly examined by the Maſters, who ſat in Court to inform the Chancellor of their Credibility, until Cauſes ſo far multiplied, and the Maſters became ſo much employed in other Affairs, that they left the Examination of Witneſſes to their Clerks, as the Barons of the *Exchequer* did to theirs, who from thence got the name of Examiners; and from thence forward the Judge did not, but the Counſel for the Party whoſe Witeſſes were to to be examined, framed the Interrogatories upon which the Clerks examined. Ibidem.

And how they were formerly proceeded on in *Chancery*.

But as Witneſſes often lived remote from the Court, it was thought more convenient to appoint Commiſſioners, to examine ſuch Witneſſes, the Court ſending a Notary of their own, who was often in Commiſſion with them, and with theſe Commiſſions they ſent a Copy of the Articles; and theſe Commiſſioners are themſelves to examine, and cannot delegate their power, for *Delegata poteſtas non poteſt Delegare.*

Where the Witneſſes lived remote from the Court, Commiſſioners were appointed to examine.

Who were themſelves to examine.

The Commiſſioners are likewiſe to be indifferent; for upon Exception to the partiality of any of them, the Court will ſupply their Places, by putting in others; for tho' they are named by the Parties, yet that is but by way of Propoſal

They muſt be indifferent.

They are the Miniſters of the Court, tho' named by the Parties.

poſal to the Court, for they are the Miniſters of the Court, and therefore muſt be impartial.

They are to have their Charges, and to be paid for their Labour.

And theſe Commiſſioners are to have their Charges, and are alſo to be paid for their Labour, that they may not be damaged for doing their Duty; and it hath been reſolved, that a Commiſſioner may maintain an Action, for the Labour and Pains he has been at, in the Execution of the Commiſſion. *Carth.* 208.

The Interrogatories formerly annexed to the Commiſſion and ſo now ſuppoſed to be.

The Interrogatories were anciently annexed to the Commiſſion, and ſo now they are ſuppoſed to be; but by Conſent of Parties, they are delivered to the Commiſſioners at the Opening the Commiſſion, and this is the preſent Practice.

The Commiſſioners are only to examine to the Interrogatories, firſt put in before them.

The Commiſſioners can only examine upon the Set of Interrogatories, that are firſt put in before them, and no new ones can be examined upon before them, without leave of the Court; becauſe their Commiſſion is to examine upon ſuch Interrogatories, as are ſuppoſed to be annexed to the Commiſſion, or ſuch as are delivered in, at the Opening of the Commiſſion.

But the Examiners may Examine upon a new ſet of Interrogatories.

But the Examiner may examine upon a new Set of Interrogatories, becauſe that is preſumed to be the Examination of the Judge, and the Judge might examine

amine upon Interrogatories, *ex Re nata*, out of the Articles. But ſee hereafter.

Now ſince this Practice has been uſed, no Doubt but the Credit of Depoſitions, *cæteris paribus*, falls much below the Credibility of a preſent Examination, *viva Voce*; for the Examiners and Commiſſioners in ſuch Caſe, do often dreſs up ſecret Examiners, and ſet a quite different Air upon them, from what they would have, if the Teſtimony were plainly delivered, under the ſtrict Examination of a Judge in open Court.

The Credit of Depoſitions much below that of an Examination, *viva Voce*.

But though the Depoſitions do fall ſhort of Evidence *viva Voce*, yet they ſeem ſuperior to what a Witneſs ſaid at a former Trial; for what is reduced to Writing by an Officer ſworn to that Purpoſe, is of more Credit than what a Stander by retains in Memory; for the Images of of the Things in the Mind, decay by the perpetual Change of Appearances, but what is reduced to writing continues conſtantly the ſame. See Lord Chief Baron *Gilbert's Treatiſe of Evidence*, 44. 45. See *Bacon's Abridgment of the Law*, Vol. 2. 299.

Yet ſuperior to what a Witneſs ſaid at a former Trial.

All Interrogatories muſt be drawn or peruſed, and ſigned by Counſel and Attorney, and are to be ingroſſed on Parchment, and are then to be brought to the Chief Remembrancer's Office, to

How Interrogatories are to be prepared.

be entered and ſigned by the Officer, for which you pay one Shilling and ſix pence.

Of producing the Interrogatories on Examination, before an Examiner, or before Commiſſioners.

And if the Witneſſes are to be examined before an Examiner of the Court, the Interrogatories are to be lodged with him, ſome convenient Time before the Examination. If in the Country on a Commiſſion, the Interrogatories may be exhibited before the Commiſſioners, on opening the Commiſſion, which (as has been ſaid before) is the general Practice.

RULE. To be to Points material, and not leading, and no general Interrogatories as to Matters material to be admitted.

By the 31ſt general Rule, when Witneſſes are to be examined, the Counſel who ſigns the Interrogatories, is to take Care that they be only to Points material, and not leading: And no general Interrogatories, as to Matters material, to be admitted.

RULE. Depoſitions of a Witneſs on leading Interrogatories, to be ſuppreſſed as to that Fact.

By the 86th general Rule, if Witneſſes are examined, on leading Interrogatories, the Depoſitions are to be ſuppreſſed, as to that Fact, upon Motion, either before, or after Publication; but not at the Hearing of the Cauſe, unleſs by Leave from the Court, then to move it; but as to any other Fact to which the Witneſſes are examined, on any Interrogatories not leading, their Depoſitions to be admitted.

By

By the 87th general Rule, where the Depoſitions of any Witneſs are ſuppreſſed, touching any Fact, he is never after to be examined, on any Interrogatories, touching the ſame Fact; but the Court may at diſcretion appoint a Tryal at Law, eſpecially where it appears, that ſuch leading Interrogatory, was drawn by Miſtake of the Counſel, and not to entrap Witneſſes. See *the* 88*th general Rule, Title Pleadings.*

RULE. And that Witneſs is never to be after examined as to that Fact: But the Court may direct a Tryal at Law.

Commiſſion to examine.

THIS is either to examine the Parties, or Witneſſes, or others; as Contemnors, *&c.*

Commiſſion to examine, what.

A Commiſſion to examine Witneſſes, is ſometimes to examine them to the Cauſe, *i. e.* as to the Merits thereof, or to ſome particular Point in Queſtion; or it may be to examine them, touching a Contempt, or the Breach of ſome Order of Court, *&c.* Examination to the Cauſe, is generally before Hearing, though ſometimes it may be after Hearing, as upon an Account referred to the Officer, or upon new Matters ariſing at the Hearing.

In what Caſes.

To the Merits.

In Aid of an Account.

To examine beyond Seas.

A Commiſſion may iſſue to examine Witneſſes beyond Seas, and then, if they be Foreigners, or Natives, to examine them on their Oaths, and the Oaths of ſkilful Interpreters.

Or in *perpetuam Rei Memoriam.*

A Commiſſion is alſo had to examine Witneſſes in *perpetuam Rei Memoriam*, touching which, ſee under *Title Bills*.

De bene eſſe.

And though a Commiſſion to examine Witneſſes, is not ordinarily to be granted, until the Cauſe be at Iſſue; yet if a Witneſs be very aged or ſick, upon making an Affidavit thereof, the Court will ſometime order it *de bene eſſe*, even before Anſwer. See under this *Title* hereafter, the whole Proceedings.

RULE. Commiſſions to examine, not to be executed in *Dublin*, or within twelve Miles of it.

By the 33d general Rule, no Commiſſion to examine Witneſſes, is to be executed in *Dublin*, or within twelve Miles thereof, without ſpecial Order firſt obtained, upon Affidavit made of their Inability to travel, or other good Matter; and that all Commiſſions taken in *Dublin*, or within twelve Miles thereof, without ſpecial Order as aforeſaid, ſhall ſtand ſuppreſſed *ipſo Facto*, and not allowed to be read in Evidence, upon the Hearing.

RULE. If Plaintiff and Defendant join in Commiſſion, Plaintiff has regularly the Car-

And by the 34th general Rule, where the Plaintiff and Defendant join in Commiſſion, for the Examination of Witneſſes, the Plaintiff is regularly to have

have the Carriage of it; but if through his own Default, or the Default of his Commiſſioners, the ſame be not executed, he ſhall pay the Defendant ſuch Coſts, as the Court (being ſatisfied of ſuch Default) ſhall think fit, and then he may renew his Commiſſion, by Order of Court, at his own Charge; and the Plaintiff to have the like, on Default of the Defendant, or his Commiſſioners, in Caſe he have the Carriage thereof. And where any Defendant hath joined with the Plaintiff, in taking out a Commiſſion, and finds Cauſe to ſuſpect, that the Plaintiff will not have the ſame executed, the Defendant, upon Affidavit to that Effect, may take out a Duplicate thereof, at his own Charge, and giving the uſual Notice thereof, may proſecute the ſame to a due Execution, and Return, as the Plaintiff ſhould regularly have done.

riage of it, but if he neglects to execute it, he ſhall pay ſuch Coſts as the Court ſhall judge reaſonable; and ſo likewiſe, where the Defendant has the Carriage of it.

Where the Defendant ſuſpects the Plaintiff will not execute the Commiſſion, he may have a Duplicate of it, and may proſecute the ſame, as the Plaintiff ſhould have done.

The Plaintiff has regularly the Carriage of the Commiſſion, and ſo is to appoint Time and Place; but if the Defendant has Cauſe to ſuſpect, that the Plaintiff will aggrieve by ſuch Appointment, he may move by his Attorney, for a Duplicate of the Commiſſion, and that the Officer might appoint Time and Place, and it ſhall be granted him.

The Defendant is to move for the Duplicate.

A Plaintiff may have ſeveral Commiſſions, to ſeveral Counties at once.

Plaintiff may have ſeveral Commiſſions, to ſeveral Counties.

The Court ſometimes fix a Place for executing the Commiſſion.

The Court ſometimes fix a Place, for the Commiſſioners of both Parties, to meet and execute their Commiſſion.

Of naming and ſtriking the Commiſſioners Names.

There are to be four Commiſſioners, but the Plaintiff and Defendant name four a-piece, and each Party ſtrikes out two; the Plaintiff is to name the firſt four.

RULE. On what Terms a new Commiſſion ſhall be granted, if the Witneſſes of either Party be not all examined on the firſt.

By the 35th general Rule, if both Parties join in Commiſſion, and the one Party examine all his Witneſſes, and the other not, but prays a new Commiſſion, it ſhall not be granted, unleſs the other Party be content, or upon Oath made of good Cauſe, why he could not examine all his Witneſſes, at the Execution of the former Commiſſion.

If Plaintiff examines in Town, Defendant may have a Commiſſion in the Country; and on what Condition Defendant ſhall have a Commiſſion after the Plaintiff hath examined his Witneſſes.

If the Plaintiff examines in Town, the Defendant is intitled to a Commiſſion in the Country, and the Court will order it, on Motion of his Attorney. If the Defendant be under no Obligation to appear *gratis*, upon the Hearing, and the Plaintiff has examined his Witneſſes, but does not procure a Rule for Publication *abſque*, until after the ſixth Day of Term, then the Defendant, upon Motion of his Attorney, and upon his engaging to appear *gratis*, on the Hearing, and ſuffer no conditional Decree, ſhall generally have a Commiſſion though

though he aſſigns no ſufficient Reaſon, why he could not examine the ſame Vacation the Plaintiff did.

No Examination in Term Time.

It is ſaid, there ought to be no Examination of Witneſſes in Term Time.

How the Plaintiff is to proceed, if he hath no Witneſſes to examine.

If the Plaintiff has no Witneſſes to examine, he uſually puts a Rule on the Defendant, to examine the enſuing Vacation, or that the Cauſe ſhould be heard on the Pleadings the next Term; but the ſhort Vacation between Eaſter and Trinity Term, is not a Vacation to examine.

On Defendant's Default and deſiring a Commiſſion, Plaintiff may have an Injunction.

If the Defendant makes Default, and deſires a Commiſſion, the Plaintiff may have an Injunction; ſo determined in the Caſe of *Barry* againſt *Martin*, in this Court, 1ſt *June* 1733.

RULE.

Commiſſion *Ex Parte* in what Caſe granted.

By 19th general Rule, the Defendant being ſerved with a *Subpœna* to Rejoin, the Plaintiff is of courſe (upon producing an Affidavit thereof) to have an Order for the Defendant to rejoin and join in Commiſſion in four Days, giving the Defendant's Attorney Notice thereof; and the Plaintiff may in eight Days after, leaving the Names of his Commiſſioners in the Office, have at his own Charge a Commiſſion *ex Parte*, directed unto two of the Plaintiff's Commiſſioners and to two more ſuch as the Chief Remembrancer ſhall think fit to

Defendant lapſing his Time of joining in Commiſſion, ſhall not afterwards have a Commiſſion without ſpecial Order.

nominate; and if the Defendant's Attorney (having Notice of it in Town) doth not in that Time name Commiſſioners for the Defendant, and pay half Coſts for the Commiſſion, if afterwards the Defendant will deſire to examine any Witneſſes of his Side, he ſhall be barr'd from having any Commiſſion without ſpecial Order of Court.

The four Days to rejoin are running Days.

It was determined by this Court, in the Caſe of *Delarne* againſt *Lewis* on a Motion to ſet aſide the Officer's Report, and on full Debate, that the four Days are running Days; and that the Rule to rejoin may be entered immediately after Service of the *Subpœna* to rejoin, without waiting four Days as was formerly thought. See *Title Replication* and *Rejoinder*.

The Method of ſettling Commiſſioners Names, for the Examination of Wineſſes, is thus.

The Method of ſettling Commiſſioners Names for Examination of Witneſſes.

THE Plaintiff's Attorney is to leave a Note in Writing, in the proper Office, of the four Commiſſioners named by the Plaintiff, with their Chriſtian and Surnames, Additions, and places of Abode, and the Place where the Commiſſion is to be executed; then he muſt ſerve the Defendant's Attorney with a Notice of ſuch Names being left in the Office,

Office, deſiring him to return the Names of his Commiſſioners in the proper Time; then the Defendant's Attorney generally ſtrikes out two of the Plaintiff's Commiſſioners, and returns the remaining two, with the Names of four Commiſſioners, with their Additions and places of Abode as aforeſaid, for the Defendant, out of which the Plaintiff alſo ſtrikes two, and the four Commiſſioners which are thus ſettled by both Parties, are to be inſerted in the Commiſſion, for the Examination of Witneſſes.

The Method for ſettling Commiſſioners Names for taking of an Anſwer.

The like Method is to be purſued by the Defendant, upon taking out a *Dedimus* to take his Anſwer in the Country, but that in this Caſe the Plaintiff hath but four Days to return the Names of his Commiſſioners after being ſerved with Names for the Defendant.

Commiſſion *ex Parte* in either Caſe, if names be not returned in Time on Application to the Officer.

And if in either Caſe, Names be not ſtruck and returned in the limited Time, the Officer of the Court will, upon Application, of courſe, name two Commiſſioners for the Party making Default, and Iſſue a Commiſſion *ex Parte*, of the Execution of which no Notice is required to be given.

The Officer gives Notice to the oppoſite Party before he iſſues a Commiſſion *ex Parte*.

But note, before the Officer ſo ſtrikes, or names Commiſſioners for a Commiſſion *ex Parte*, either to take an Anſwer, or examine Witneſſes, he firſt gives Notice thereof uſually twenty-four Hours, to

to the Attorney for the Party making Default.

Time given by the Court to return Commiſſioners Names.

If when the Attorney is ſerved with Commiſſioners Names, he has not Time in the four Days on Commiſſions to take Anſwers, or in the eight Days on Commiſſions to examine, to get a Return from his Client of Names, for him, it is uſual to move for a reaſonable Time, if it be in Term, to ſend to his Client.

How to manage if ſeveral Defendants are to ſerved with Commiſſioners Names who have different Attornies.

If there be ſeveral Defendants, who have different Attornies, the Court, upon Motion of the Plaintiff 's Attorney, will order, that the Attornies for the Defendants, do join in ſtriking the Names of the Commiſſioners, for the Examination of Witneſſes, and the Attornies for the ſeveral Defendants, are to be ſerved with the Names of the Commiſſioners, and alſo with this Order; and the Names of the Commiſſioners are alſo to be lodged in the Office as aforeſaid; and if the Attornies for the Defendants, do not comply with the Order in eight Days after Service thereof, and in the Names of Commiſſioners for the Plaintiff; the Officer will, on Affidavit of ſuch Service, ſtrike Commiſſioners for the Defendants and give the Plaintiff a Commiſſion *ex Parte*.

Commiſſion *ex Parte*.

Ibidem.

The Officer generally ſtrikes the Names of Commiſſioners for the Defendants, without any Affidavit of the Ser-

Service of the Order, or of the Names for the Plaintiffs; but a prudent Agent, ſhould have ſuch Affidavit ready to produce at all Times, and alſo of the Service of the Rule to rejoin.

Commiſſions when to be returnable.

All Commiſſions for Examination of Witneſſes are to be made returnable on one of the Return Days, unleſs where the Parties agree to have it returnable without Delay, or where an Order is obtained for that Purpoſe: And when a Commiſſioner is returnable without delay, if it be within the Kingdom, it muſt be returned by the ſecond Return of next Term; if executed afterwards it is void, and the Depoſitions ought to be ſuppreſſed. *Per Cur.* 2 *Vern.* 197.

Commiſſion *ſine Delatione.*

When to be returned.

Commiſſion not to be executed in Term Time, but by Order or Conſent.

And no Commiſſion can be executed in Term Time, unleſs by Leave of the Court or by Conſent.

What Notice is to be given of ſpeeding the Commiſſion.

He who has the carriage of the Commiſſion, muſt give fourteen Days Notice ſigned by his Commiſſioners, of the Time and Place for executing the Commiſſion, to the oppoſite Party, excluſive of the Day of ſerving the Notice, that he may apprize his Commiſſioners thereof; and ſuch Notice muſt be given to all the Defendants who join in ſuch Commiſſion, otherwiſe it is not good Notice; and the Depoſitions may be ſuppreſſed for Irregularity. But perſonal Notice is not neceſſary: And in Default of

On Default of Notice, the Court

will grant the other Party a new Commiſſion, or the Defendant, having a Duplicate, may execute it; but the Names of the Witneſſes need not be delivered to the other ſide, unleſs the Examination be in *Dublin*.

of Notice, the Court will grant the other Side a new Commiſſion, or in Caſe of the Plaintiff's refuſing to give Notice, the Defendant having a Duplicate of the Commiſſion, may uſe it. But note, the Names of the Witneſſes need not be delivered to the other Side, which muſt be, where the Examination is in Town before an Examiner.

How to manage if the Party to be ſerved is not to be found.

If Notice is directed to be given to a Perſon you cannot find, then on Affidavit thereof, and filing it, you may, on Motion, obtain an Order for the Officer to appoint Time and Place.

The Notice of executing a Commiſſion.

Form of the Notice.

A. B. and others Plaintiffs. *T. M.* and others Defendants. } WHEREAS we have received a Commiſſion out of the Chancery Side of his Majeſty's Court of *Exchequer* in *Ireland* bearing Teſt, the Day of laſt paſt, and returnable into the ſaid Court next enſuing, to us, and to *H. H. G. H.* or any two or more of us directed for Examination of Witneſſes in this Cauſe; theſe are therefore to give Notice, that we will execute the ſaid Commiſſion at the Houſe of in the County of commonly called or known by the name or Sign of on the Day of between the Hours of and of the Clock in the noon of the ſaid Day, where you,

you, together with your Commiſſioners and Witneſſes may be preſent if you think proper. Given under our hands the Day of

To the Defendant *T. M.* and the other Defendants or Mr. *H. H.* and Mr. *G. H.* two of the Commiſſioners in the ſaid Commiſſion or any of them.

E. M.
P. M.

And the Witneſſes are alſo to be ſerved with a Summons to appear before the Commiſſioners at the Time and Place appointed for executing the Commiſſion, to depoſe their Knowledge to each Interrogatory; which Summons is in this Form.

A Summons for Witneſſes to appear.

B. D. and others Plaintiffs.
F. M. and others Defendants.

WHEREAS, *&c.* (as before) And whereas we are informed that you, whoſe Names are under-written, are material Witneſſes for the Plaintiff (or Defendant as the Caſe is) in this Cauſe. Theſe are therefore by Virtue of the ſaid Commiſſion, to will and require you, and every of you, to be and appear perſonally before us, or any two or three of us the ſaid Commiſſioners, at the Houſe of, *&c.* (as in the former Notice) and you are then and there to attend, and

Form of the Summons to appear.

and not to depart until you have been examined, and have teſtified your Knowledge for, and on Behalf of the Plaintiff (or Defendant) and herein you are not to fail. Given under our Hands, the Day of, &c.

To *W. R.* and *P. T.* *E. M.*
Witneſſes. *P. M.*

N. B. Mention their Additions.

Subpœna to teſtify, and how to be ſerved.

If a Witneſs be unwilling to come, you muſt then iſſue a *Subpœna ad teſtificandum*, and let a Copy be made thereof, and thereto ſubſcribe the above Summons, and put the Names of your Commiſſioners thereto; and let the Witneſs be ſerved therewith, as *Subpœnas* to anſwer are ſerved, ſome reaſonable Time before the Execution of the Commiſſion, according to the Diſtance of his place of Abode, from the Place where the Commiſſion is to be executed.

RULE.
An Attachment againſt a Witneſs for refuſing to appear, after ſervice of *Subpœna*, and being tendered reaſonable Charges, and one Shilling only to a Witneſs ſerved in *Dublin*, to appear before a Baron.

By the 85th general Rule, if a Witneſs be ſerved with a *Subpœna ad teſtificandum*, to appear before a Baron, or Commiſſioners, and fail to appear; upon Affidavit made thereof, an Attachment, upon Counſel's Motion, ſhall iſſue to the Purſuivant, provided the Witneſs be tendered reaſonable travelling Charges; but if a Witneſs be ſerved in the City of *Dublin*, with *Subpœna* to appear before a Baron, then only a Shilling is to be tendered to the Witneſs.

But

But ſometimes the Court do fix ſome certain Time for the Witneſs to come up, and be examined, at his own Expence, otherwiſe an Attachment to iſſue againſt him, without further Motion. But note, if the Examination be in Town, it is uſual to have a Certificate from the Examiner, that the Interrogatories are lodged with him, and that the Witneſs did not attend.

Or will firſt order the Witneſs to attend, to be examined at his own Expence.

Certificate from the Examiner, that the Interrogatories are lodged, and that Witneſs did not attend.

Or if a Witneſs be ſummoned by the Commiſſioners, without a *Subpæna ad teſtificandum*, and do not appear, the Court will order ſuch Witneſs to attend, and to be examined; and if he diſobey ſuch Order, then an Attachment ſhall go againſt him. *Pract. Reg.* 89, 90. For the Commiſſioners are by their Commiſſion, not only authorized and impowered, but commanded to cauſe the Witneſſes to come before them, and examine them upon the Interrogatories to be exhibited to them.

If a Witneſs be only ſerved with a Summons, not with a *Subpæna*, and diſobeys, the Court will Order him to attend, to be examined, and if he diſobeys will attach him.

The Commiſſioners and Witneſſes being met together, at the Time and Place appointed, according to the Notice; the Commiſſion (which till that Time muſt remain ſealed) may be opened, that the Commiſſioners may ſee that they have an Authority, and ſufficient Warrant to juſtify their Proceedings.

The Commiſſion to be opened, on the meeting of the Commiſſioners.

The

The Oath to be taken by the Commiſſioners, and by their Clerk, on the Commiſſion.

The Commiſſioners for Examination of Witneſſes, ſhall take an Oath before the Execution of any Commiſſion, to execute the ſame faithfully and impartially, and not to publiſh or divulge the ſame, until Publication be paſſed by Order of Court; which Oath, each Commiſſioner is impowered to adminiſter to the other; and the Clerk, or Clerks attending ſuch Commiſſioners, ſhall take an Oath, which is to be adminiſtered by the Commiſſioners, to write down the Depoſitions of Witneſſes, truly and indifferently, without Partiality, and not to divulge the ſame until Publication, and a Clauſe ſhall be inſerted in the Commiſſion for that Purpoſe.

Plaintiff's Commiſſioners may examine Defendant's Witneſſes, if his Interrogatories are produced, though his Commiſſioners do not attend.

There muſt two Commiſſioners appear, or the Commiſſion cannot be executed; but in caſe the Commiſſioners named by the Defendant do not appear, if his Interrogatories are produced, and his Witneſſes attend, the two Commiſſioners named by the Plaintiff, if they attend, may as well examine the Defendant's Witneſſes, as thoſe for the Plaintiff; and it is a very miſtaken Notion amongſt Commiſſioners, if they think they are to be Advocates for the Party, by whom they are named, for they are the Miniſters of the Court, and are equally concerned for both.

But

But if the the Defendant's Commiſſioners attend, at the Time and Place appointed, and the Plaintiff's Commiſſioners are not there, they cannot go on, if the Plaintiff, having the Carriage of the Commiſſion, will not produce it: This makes a Duplicate of the Commiſſion moſt neceſſary, for in that Caſe, if the Defendant's two Commiſſioners, or any two of the four Commiſſioners, attend, they may proceed in the Execution of the Commiſſion.

If the Plaintiff's Commiſſioners do not attend, and he having the Carriage of it, will not produce it, the Defendant cannot proceed, unleſs there be a Duplicate.

By the 31ſt general Rule, the Commiſſioners and Examiners (whoſe Duty it is,) are themſelves to examine, and not to truſt the ſame with inferior Clerks, and are to take Care to keep the Witneſs to the Point interrogated, not permitting him to run into Extravagancies.

RULE. Commiſſioners and Examiners, are themſelves to examine, and not to truſt to Clerks.

When a Witneſs is produced, he is firſt to be examined upon the Interrogatories of the Party producing him, and then forthwith, (without ſuffering him to go abroad) upon the croſs Interrogatories of the other ſide. And the Examiners and Commiſſioners are to take Care, that they do not permit any Witneſs to read over the Interrogatories, or ſuffer any Witneſs to have them in his Cuſtody, before he be examined, or to pen his own Depoſitions, or depart before he be fully examined. And when his Examination is finiſhed, he

The Duty of Commiſſioners and Examiners, in Examination of Witneſſes.

is to ſign the Dominicles, or Paper Draught, of the Depoſitions he has ſo given.

Commiſſion not to be ſuppreſſed, but for irregularity; but the Court will attach the Commiſſioners for miſbehaviour.

The Court will not ſuppreſs a Commiſſion, but for ſome plain Irregularity in the iſſuing or executing of it; but if any of the Commiſſioners obſtruct the others in the Examination of the Witneſſes, or miſbehave therein, or in any other Reſpect in the Execution of the Commiſſion, the Court, upon Complaint thereof by the injured Party, ſet forth by a proper Affidavit, and upon the other Commiſſioners certifying the particular Miſbehaviour, will, on Counſel's Motion, and on due Notice given, award an Attachment againſt the Party offending: And note, the Certificate of the Commiſſioners, ſhall be ſufficient without their Affidavit; becauſe being Officers of the Court, *pro hac Vice*, they are allowed to certify; but there muſt be an Affidavit produced by the Party complaining, otherwiſe the Court will take no Notice of the Certificate; becauſe the Commiſſioners are appointed for another Purpoſe, and not to Certify to the Court, but of Neceſſity.

Commiſſioners attached for receiving Depoſitions ready drawn.

Commiſſioners have been attached for receiving the Depoſitions of Witneſſes ready drawn.

And

Commiſſioners attached for refuſing to examine an illiterate Perſon.

And in the Caſe of *Reilly* and *Reilly*, the Commiſſioners were attached for refuſing to examine a Witneſs, becauſe he was illiterate, and the Witneſs was afterwards examined, by an Examiner, by Order of Court, *Trinity* Term, 1743; but in this Caſe, the Facts were verified by the Commiſſioners, by Affidavits.

Examiner ordered to anſwer perſonal Interrogatories, for an irregular Examination.

And upon Complaint of an irregular Examination, an Examiner has been ordered to anſwer perſonal Interrogatories, and not admitted to have a Copy of them.

RULE.

Further Duty of Examiners, and Coramiſſioners in the Examination of Witneſſes.

By the 36th general Rule, Commiſſioners and Examiners of the Court are to take Care, that after a Witneſs is examined, his Examination be by him read over, or carefully read over to him; and then each Witneſs is to ſubſcribe his own * Depoſitions, after which no Alteration is to be made thereof, without Order of the Court; and the Commiſſioners are to take Care, that neither they, nor their Clerks, make any Diſcovery of any Matter depoſed before them, until Publication be had in the Cauſe, by Order of Court; and the Commiſſioners and Examiners are to ſet down the Examination of every Witneſs

* It would be proper that the Witneſs ſhould ſign every Sheet of his Depoſitions, in the Paper Draught.

neſs at large, without referring the Teſtimony of one, to another; and are to be careful that no impertinent or needleſs Repetitions be ſet down, nor is any Anſwer to be ſet down, otherwiſe, (to ſuch Interrogatories to which the Witneſs is produced and cannot at all depoſe) than thus, 'To ſuch Interrogatory Deponent cannot depoſe.'

If a Witneſs ſwears reflecting Words, the Examiners to blame, if they be taken down.

A Witneſs examined at a Commiſſion ſwears reflecting Words, it was determined he ought not to pay Coſts, it being the fault of the Commiſſioners to take down ſuch Depoſitions. 2 *Williams*, 506.

A Commiſſioner may be examined as a Witneſs.

A Commiſſioner may be examined as a Witneſs, but then he muſt be firſt examined; and if others be examined before him in his Preſence, he cannot be examined afterwards, having heard the Depoſitions of the Witneſs firſt examined; and for this Reaſon, a Commiſſioner was examined in Court, his former Depoſitions being ſuppreſſed; for if it were otherwiſe, a Commiſſioner might lie in wait, and after having Knowlegde of the Depoſitions might by his Oath conteſt the ſame. 2 *Ch. Ca.* 68. 79.

Witneſſes and Depoſitions, how to be ſet down.

The Names and Additions of the Witneſſes, *&c.* and their Depoſitions or Anſwers, are thus put down.

A. B.

A. B. of in the County of Gent. aged Years and upwards, being produced, ſworn and examined, on the Behalf of the Plaintiff, (or Defendant) depoſeth as followeth.

To the firſt Interrogatory this Deponent ſaith that, *&c.*

To the ſecond Interrogatory this Deponent cannot depoſe.

To the third Interrogatory not produced.

And ſo proceed through the reſt of the Interrogatories, as the Caſe is.

The Stile to be fixed to the Dominicles, and Ingroſſment, is the ſame with the Indorſement, on the Wrapper, in Page 596, but that you add the Teſt and Return of the Commiſſion.

The Stile of the Depoſitions.

If a Commiſſion be adjourned to another Day, and Place, and Witneſſes are examined, the Time and Place where ſuch Examinations are taken, ought to be mentioned, and ſet down in the Title of the Depoſitions.

Adjournment of Commiſſion to another Day and Place, how to be ſet down.

The Commiſſioners ought not to adjourn without Neceſſity, becauſe that would be to haraſs the Defendant, by

obliging him to travel from Place to Place, to croſs-examine; but if it be neceſſary they may adjourn both in Time and Place.

And this affair ſhould be performed as much as poſſible, *uno Actu*, that there may be as little Opportunity as poſſible, to divulge their Depoſitions, by which either Side may better their Proof.

Writings proved, and Exhibits made of them.

If there be any Writings directed by the Commiſſion to be proved, the Commiſſioners are to give Directions to bring them in for that Purpoſe; and after they are proved, Exhibits may be made of them.

And the Exhibits muſt be indorſed after the following manner.

5th *March* 1746.

The Indorſement to be written on the Exhibit.

A. B. Plaintiff. } AT the Execution of
C. D. Defendant. } a Commiſſion for the Examination of Witneſſes in this Cauſe, this Deed (or Parchment or Paper-writing) was produced and ſhewn to *E. F.* and by him depoſed unto, at the Time of his Examination, to the third Interrogatory, on the Plaintiff's Part; and was alſo produced and ſhewn unto, *&c.* and by him, depoſed, *&c.* before us,

G. H.
J. K.

When

When the Witneſſes are examined, the Depoſitions with the Witneſſes Names thereto, are to be ingroſſed on Parchment, in like Manner as the Interrogatories, and to be examined carefully with the Paper Draughts; after which the Commiſſioners only, not the Witneſſes, ſign ſuch Schedule, or Skin of Parchment of the Examinations; and alſo the Interrogatories; and then bind them up with the Commiſſion, and the Paper Draught or Dominicles * (uſually called, making up the Commiſſion) with ſome Tape or other String, ſetting all their Names and Seals, upon the ſame; but before the Commiſſion is ſealed up, they are to indorſe upon the Back of the Commiſſion, towards the middle thereof, the Execution, to which they ſubſcribe their Names as followeth:

The ingroſſing the Depoſitions, and making up the Commiſſion.

The Return of the Commiſſion.

> The Execution of this Commiſſion appears in a certain Schedule or Schedules to this Commiſſion annexed.
>
> *G. H.*
> *J. K.*

* I cannot find this Word, as it is here ſpelled, in any *Dictionary* extant; nor any Word like it, except the Word *Dominical*, which has a Signification no way relative to what the above Word is here intended to expreſs, to wit, the firſt Draught of the Depoſitions, and it is thus ſpelled in every Commiſſion.

How to be delivered to the Perſon who brings it to *Dublin*, and the Oath he is to take upon it's being received.

When the Commiſſion is executed and made up, as aforeſaid, the Commiſſioners muſt deliver the ſame perſonally, to the Perſon who is to bring it to Town; who is to deliver it to a Baron in Town, and to make Oath that the Commiſsion has not been opened, or altered ſince he received the ſame from the Hands of the Commiſsioners. And note, the Commiſsioners are to be very careful, with whom they intruſt the Packet, for by the Commiſsion they are to return it the Court.

But if brought up by one of the Commiſſioners, he is not to take any Oath.

But if the Commiſsion is carried by one of the Commiſsioners, no Affidavit is required; and you need only indorſe it thus,

But it muſt be ſo indorſed.

25th *March* 1747, received by the Hands of *G. H.* one of the Commiſsioners.

The Form of the Indorſement on the Wrapper.

Form of the Indorſement on the Wrapper, when the Plaintiff has the Carriage of the Commiſſion, and the Defendant joins in the Examination.

A. B. and others, Plaintiffs. } Depoſitions of Witneſſes, taken at the Houſe of
C. D. and others, Defendants. } in the Town of in the County of the Day of by Virtue of a Commiſsion iſſued under the Seal of his Majeſty's Court of *Exchequer* in *Ireland*, for the Examination of Witneſſes

neſſes in this Cauſe, as well on the Part of *A. B.* Plaintiff, as on the Part of *C. D.* Defendant.

Note, when the Commiſsion is obtained on the Part of the Defendant, and the Plaintiff joins therein, the Words of the Commiſsion and Label are, *as well on the Part of C. D. Defendant, as on the Part of A. B. Plaintiff.*

The like when the Defendant has the Carriage.

If it be an *ex Parte* Commiſsion, then the Words are, *on the Part of the Plaintiff*, or the Defendant, as the Caſe is.

The like on an *ex Parte* Commiſsion.

The Direction to be indorſed on the Wrapper.

To the Right Honourable the Chancellor, Treaſurer, Lord Chief Baron, and the reſt of the Barons of his Majeſty's Court of *Exchequer* in *Ireland.*

The Direction.

By the 37th Rule, all Commiſsioners and Examiners, are to take Care, that they do not make it known, directly, or indirectly, by Writing, or otherwiſe, to the adverſe Party, or any other, any of the Interrogatories delivered, or Depoſitions taken on them, before Publication be paſſed, and Copies of them taken out, ſave only to the Deponent who comes to be examined, or to the Baron before whom he is examined, if he requires it.

RULE. Depoſitions, *&c.* not to be divulged before Publication, except to the Deponent, or to the Baron, before whom he is examined.

Not-

Dominicles to be returned with the ingroſſed Depoſitions.

Notwithſtanding the above Rule, it is very well known, that the Parties did frequently come to the Knowledge of the Depoſitions, by Means of Copies taken from the Dominicles, or Paper Draught in the Commiſsioners Hands; to remedy which, a Rule was made, that the Commiſsioners ſhould return the Dominicles, together with the ingroſſed Depoſitions.

Depoſitions not to be opened or copied till Publication.

On delivery of the Commiſsion, the Examinations or Depoſitions are not to be opened or copied, until Publication be actually paſſed.

The Solicitor's Clerk not to engroſs the Depoſitions.

Depoſitions have been ſuppreſſed, becauſe the Solicitor's Clerk ingroſſed them.

The Solicitor for the Plaintiff not to be a Commiſſioner.

So where they have been taken before the Plaintiff's Solicitor, who was one of the Commiſsioners, the Court have ordered the Solicitor to pay all the Coſts, or an Attachment to go againſt him. *Bunb. Rep.* 289.

A Papiſt objected to as a Commiſſioner.

It is ſaid, it has been objected in this Court, that a Commiſsioner was a Papiſt, and allowed. *Quær.*

A Commiſſioner may be Clerk on the Commiſſion, but two Commiſſioners muſt ſwear him.

A Commiſsioner may be a Clerk on the Commiſsion, but in this Caſe, it is ſaid, there muſt be two Commiſsioners to ſwear him.

If

If by Default of him that has the Carriage of the Commiſsion, nothing is done thereon, he ſhall bear the Charges the other Side is put to about it, either for Fees of Court, or retaining Commiſſioners, or Witneſſes, or otherwiſe, to be aſcertained by the Oath of the Party, or him that diſburſed the Money for him, and ſhall renew the Commiſsion at his own Coſt.

New Commiſſion, if by Default of him that has the carriage of it, nothing be done, and he to pay all Coſts, and to renew the Commiſſion.

If there be due Notice, of executing a Commiſsion, and at the Day appointed the Commiſsioners meet, and the Commiſsion is opened, and no Witneſſes examined, nor Adjournment made, the Commiſsion is loſt; except the other Side agree to adjourn, or to take new Notice; but if it be not opened, they may give new Notice, and proceed, unleſs in the mean Time, an Order of Court be obtained, to pay the Coſt of the former Day, before they proceed: And the Reaſon of this Rule ſeems to be, that the not adjourning is a Refuſal of the Commiſsioners to act any further upon it, beſides their Power to adjourn, ariſes from the Words of the Commiſsion, which are, *We Command you, &c. that at certain Days and Places, you do cauſe the ſaid Witneſſes to come before you, &c.* ſo that if they do not provide Time and Place by an Adjournment, they have no Authority further to act by

If the Commiſsioners meet, and the Commiſſion is opened, but no Witneſſes examined, nor Adjournment made, the Commiſſion is loſt, but if it be not opened, new Notice may be given.

by that Commiſsion; for the delegated Authority muſt purſue the Words of the Commiſsion, or elſe it will be conſtrued as a Refuſal to Act: But if they do not open the Commiſsion, their not acting at that Time will not be conſtrued as a Refuſal to Act; beſides, until the Commiſsion be opened, they do not know what their Authority is; but it is an haraſsing of the Defendant, for which he may complain to the Court, and have his Redreſs. *Prax. Alm. Cur.* 83.

When any Commiſsion is loſt, through default of him who has who has the Carriage of it, he ſhall pay Coſts, and the other Party ſhall have a new Commiſsion.

Where one of the Plaintiff's Commiſsioners, and one of the Defendant's meet, and the Commiſsioner for the Plaintiff refuſes to Act, the Commiſsion is loſt; but the Plaintiff ſhall pay the Defendant his Coſts, and the Defendant ſhall have a new Commiſsion, and the carriage of it; and ſo it is, when any Commiſsion is loſt, through the default of him that has the Carriage of it; for he is unworthy to have the Carriage of the Commiſsion, who appears to make a Default in the Execution of it. *Pract. Regr.* 87.

If one Side examines, and the other Side makes Default, and prays a new Commiſsion, on what Terms it ſhall be granted, either where his Commiſsioners do or do not attend.

After due Notice has been given, if the one Side proceeds, and examines his Witneſſes, the other Party if he does not examine, ſhall not have a new Commiſsion, unleſs Affidavit be made by the Party who did not examine, of ſome reaſonable

reaſonable Cauſe for his not examining, and that neither he, nor any for him, or by his Directions, or Knowledge, have ſeen, heard, read, or been informed of the Depoſitions taken, or any Part of them; nor willingly will ſee, *&c.* until he has examined or until Publication. This is, that the Defendant may not have the Advantage of knowing what has been proved for the Plaintiff, and ſo have an Opportunity to conteſt it. But if on ſuch Commiſsion, the Commiſsioners for both Sides attend, and the Defendant produces no Interrogatories, the Court will be very cautious how they grant him a new Commiſsion; becauſe he might form his Interrogatories upon the Diſcoveries made to his Commiſsioners, of what the other Side examined to. *Pract. Reg.* 89.

He is to pay all the Coſt of the new Commiſſion.

And where ſuch new Commiſsion is granted, it ſhall be intirely at the Charge of him that prays it, and the other Side ſhall croſs-examine without Charge.

Unleſs the other Side produces Witneſſes.

But if the other Side will upon ſuch new Commiſsion produce any Witneſſes, he muſt be at equal Charges, becauſe he has equal Benefit by the Examination.

And he is to examine all his Witneſſes on the new Commiſſion.

And note, that he at whoſe inſtance a Commiſsion is renewed, muſt examine all his Witneſſes upon ſuch new Commiſſion, or in Court, before the Return

turn of it; becauſe he ſhall not be indulged a further probatory Term. *Pract. Regr.* 89.

The Charges attending the execution of ſuch Commiſſion to the other Party, to be paid, or the Depoſitions not to be read.

If the other Side produces no Witneſſes, and he at whoſe inſtance the new Commiſſion is granted, refuſes to pay him his reaſonable Charges, and to reimburſe him what he has reaſonably expended, in attending the Execution of ſuch Commiſſion, on Complaint thereof, the Court will not ſuffer the Depoſitions taken on ſuch Commiſſion to be read, until the Charges reaſonably expended, to be aſcertained by the Oath of the Party, or of him who diſburſed the money for him, be diſcharged.

A new Commiſſion where Witneſſes do not appear.

Where the Witneſſes are duly ſummoned, but do not appear, a new Commiſſion may be had upon Oath thereof.

New Commiſſion if Exhibits of Writings are altered or interlined.

Certain Exhibits of Writings which were given in at a Commiſſion for Examination of Witneſſes were altered, and interlined, ſince the Commiſſion executed; a new Commiſſion was granted to examine as to this Matter, but not as to the Merits on new Interrogatories. *Hill. 25th. Car.* 2, between *Richardſon* and *Lowther*, 1. *Ch. Ca.* 273; tho' it was objected that the Party had a Commiſſioner preſent, and that he could not know it, but by the diſcovery of his Commiſſioner who ought not to diſcover the Examination.

But

But where a Witneſs alledged that he had miſtaken himſelf at a Commiſſion, and the Commiſſion being returned, he came to *London* and made Oath that he was ſurprized, upon which a ſpecial Commiſſion iſſued to examine the Witneſs, which was done accordingly; but this ſpecial Commiſſion was ſuppreſſed by the Maſter of the Rolls by the Advice of the Six Clerks, as contrary to the courſe of the Court. 1 *Ch. Ca.* 25.

No new Commiſſion where a Witneſs has miſtaken himſelf.

But the Court will grant an Order on Motion and Affidavit of Surprize, to have the Witneſſes Examined *viva Voce*, in Court, or his Depoſitions amended, the Witneſs being firſt examined before an Examiner; but when he is examined in Court, or when his Depoſitions are read, the Order for that purpoſe muſt be produced in Court. *Bac. Eq. Ca.* 102.

But he may be Examined *viva Voce*, or his Depoſitions amended, being firſt examined by an Examiner.

Where it appears to the Court, that either the Examiner is miſtaken in taking the Depoſition, or the Witneſſes in making it, ſuch Depoſition ſhall be amended after Publication, and the Witneſs to ſwear it over again; ſo determined in the Caſe of *Griels* againſt *Ganſel*, 2 *Williams* 647. And Lord Chancellor *King* there declared, that it was for the advancement of Truth and Juſtice, that the Miſtake ſhould be amended, and the ſooner the better, in Regard the

A Miſtake in a Depoſition amended after Publication.

the Witneſs may be dead, or in remote Parts before the Hearing; and it would be hard and unjuſt to pin a Witneſs down to what is a Miſtake, by denying to rectify it; and as to the Objection of the Inconveniency of amendinga Depoſition after Publication, it was impoſſible to know the Miſtake until Publication.

The Names of the Witneſſes affixed to the Ingroſſment from the Dominicles, after Publication.

And in the Caſe of *M'Clenehan* againſt *Magee* and others the 26th Day of *February* 1747, after the Cauſe had been heard, and a Decree to an Account, the Court, on Counſel's Motion, on Notice on Behalf of the Plaintiff, ordered that the Ingroſſment of the Depoſitions ſhould be amended by the *Dominicles*, by adding to the Ingroſſment the Names of the Witneſſes ſigned to the *Dominicles*, but omitted in the Ingroſſment, by neglect of the Clerk, who ingroſſed the Depoſitions.

Affidavit of having Witneſſes beyond ſeas for for a new Commiſſion, what to contain.

A General Affidavit of having material Witneſſes beyond Seas, ſhall not be ſufficient for a new Commiſſion, but the Witneſſes muſt be named in the Affidavit, and the Point mentioned, to which they can materially depoſe. 1 *Vern.* 334.

On a new Commiſſion no additional Interrogatories allowed but in ſpecial Caſes.

And in all Caſes where a new Commiſſion is granted, Care muſt be taken that neither Party, add to or alter their Interrogatories, they muſt examine upon the old Interrogatories, which were exhibited at the former Commiſſion,

and

and are not to add any new ones, without ſpecial Leave of the Court; and they are to be ſettled by a Baron, and never allowed but in extraordinary Caſes.

Witneſſes not twice examinable.

And note, Witneſſes, who have been examined on the firſt Commiſſion, cannot be examined upon a ſecond, to the ſame Matter, without Leave of the Court. *Bunbury's Rep.* 24.

If the Commiſſioners proceed to examine and adjourn, and one of the Defendant's Commiſſioners takes away the Commiſſion, yet the other Commiſſioner may proceed, and the Court will grant a *Subpœna duces tecum* to bring in the Commiſſion.

If Commiſſioners meet and examine, and afterwards adjourn, and one of the Defendant's Commiſſioners take away the Commiſſion, and the other Commiſſioners meet at the Day adjourned, and examine Witneſſes, and return the Depoſitions, the Court will order ſuch Depoſitions to ſtand, and a *Subpœna duces tecum* to iſſue againſt the Commiſſioner, that he may bring in the Authority, by virtue of which the Depoſitions were taken; for if they had a proper Authority, they not having the Commiſſion before them does not impeach the Depoſitions. *Pract. Reg.* 93. 4.

Tho' the Place for executing the Commiſſion be fixed by the Court, yet the Commiſſioners may adjourn.

And note, altho' the Place for executing the Commiſſion be fixed by the Court, yet the Commiſſioners may agree to adjourn to another Place; for the Appointment by the Court is only for the opening of the Commiſſion, therefore if the Commiſſioners agree, they have yet Power to make proper Adjournments.

Witneſſes examined in Town.

If the Witneſſes live in Town, or within twelve Miles thereof, and you have no Occaſion to go to a Commiſſion in the Country, or after you have examined ſome Witneſſes in the Country, you have others to examine in Town, then you are to exhibit your Interrogatories in the Examiner's Office, as before in Page (576) but Iſſue muſt beſirſt joined, or Rules given as aforeſaid.

RULE. Proceedings on examining in *Dublin*.

By the 32d general Rule, the Attornies are to take care that they give the Attorney for the adverſe Party the Names and dwelling Places in Writing of their Witneſſes, and before which of the Barons they intend to examine them, four Days at leaſt before they proceed to their Examination, to the end, that the adverſe Party may exhibit croſs Interrogatories to the ſaid Witneſſes, if he think fit; but in Caſe the Party to be examined be in Danger of Death, upon Affidavit thereof, ſhorter Notice may ſerve. And if a Witneſs be examined on one Side, and afterwards he be ſerved with a Proceſs to be examined on the other Side, and refuſe, the Court will not allow his Depoſitions to be uſed, becauſe he hath ſhewed himſelf partial.

If a Witneſs examined on one Side, refuſes to be examined by the other Party, his Depoſitions ſhall not be uſed.

Before the Witneſſes are examined in *Dublin*, they are to be ſworn, before a Baron.

All Witneſſes or Parties to be examined in *Dublin*, muſt be firſt ſworn before one of the Barons, to anſwer truly

to

to the Interrogatories; and their Names who are ſworn, muſt be indorſed by the Examiner or his Clerk upon the Interrogatories.

The Party who produces a Witneſs muſt procure him to ſtay, or return to be Croſs-examined, if required, and the croſs Interrogatories prepared, but not otherwiſe.

If Interrogatories are filed for croſs Examination of a Witneſs, the Party who produces him is obliged, if the other Party requires it, to procure him to ſtay or return to be examined; but if no ſuch Interrogatories are filed, or he is not demanded to be croſs-examined at the ſame Time when he is under Examination, and if he goes away about his Buſineſs, the Party who intends to croſs-examine him, muſt get him examined as well as he can, and the adverſe Party is not in that Caſe bound to produce him over again to attend to be croſs-examined, ſince it was the Party's Fault who would croſs-examine the Witneſs, that he had not the Interrogatories ready whilſt he was under his former Examination.

If a Party who has examined on a Commiſſion; ſhall alſo examine in Town, he need only lodge with the Examiner ſuch of the Interrogatories as he would examine to.

If a Party examines ſome Witneſſes in Town and others by Commiſſion, he is not obliged to exhibit or file his whole Sett of Interrogatories with the Examiner, he may only file ſuch as he hath Occaſion to examine to in Town, but they muſt be the ſame as were exhibitted before at the Commiſſion; if this were otherwiſe it would put the Parties to a double Expence of paying for Co-

pies of the whole Interrogatories twice over.

Miſbehaviour of Witneſſes.

If a Witneſs miſbehaves, or refuſes to anſwer, the Commiſſioners ought to certify it to the Court, and they will order an Attachment, and will oblige him to come up to be examined at his own Coſt before an Examiner.

Or tampering with Witneſſes.

If any Practicer or other Perſon goes about to tamper with, or ſuborn any Witneſs, upon Complaint thereof, and upon Examination and Proof of the Matter upon Oath, he ſhall ſtand committed.

A Witneſs cannot demur, becauſe the Queſtions aſked him are not pertinent.

A Witneſs cannot demur becauſe the Queſtions aſked him are not pertinent to the Matter in Iſſue. 1 *Vern.* 165.

A Peer of the Realm is to put in his Anſwer to a Bill upon Honour, but his Anſwer to Interrogatories and Examination as a Witneſs muſt be on Oath.

Athough the Privilege of Peerage doth allow a Peer to put in his Anſwer upon Honour only, yet it is reſtrained to an Anſwer; and as to all Affidavits, and where a Peer is examined as a Witneſs on Interrogatories, or *viva Voce*, he muſt be upon his Oath. *Peer Williams* 147.

Such Defendants only as to whom Iſſue is joined, to named in the Commiſſion and Interrogatories.

If there be ſeveral Defendants in the Cauſe, and that Iſſue is not joined as to ſome of them, the beſt Way is to name thoſe Defendants only as Parties to the Commiſſion and Interrogatories as to whom

whom Iſſue is joined, and to put the Words (and others) after them; and the Reaſon is, if a Defendant ſhould be misnamed, or a Party omitted, who ſhould have been in, or a Party inſerted as a Defendant who has been ſtruck out of the Cauſe, or ought not to have been in, the Examination will not be in the Cauſe, in which it was intended.

The Time allowed for filing the Commiſſion.

Four Days are allowed after the Return Day mentioned in the Commiſſion, to file the Commiſſion and the Depoſitions, and no further Time will be granted, without ſpecial Reaſon aſſigned to the Court, by Counſel, upon Affidavit of the Facts.

Of Publication.

The Proceedings on Publication at the Civil Law.

THEY had antiently at the Civil Law as appears by the 90th *Novel Ch.* 5. *Coll.* 7. *Title* 2d. *De Teſtibus quia vero*, three probatory Terms, or *Dilationes* according to the Rule of the Civil Law. See *Lancel. Inſt.* of the Canon Law, 92. *Gail* 157, *de Dilat. Maranta de Dilat.* 305.

Ibidem.

In Teſtem teſtes, et in hos, ſed non datur ultra; in the firſt probatory Term the Plaintiff and Defendant were to produce their firſt Sett of Witneſſes; in the ſe-

cond they were to bring Witneſſes to their Credit, or to invalidate their Teſtimony; and in the laſt probatory Term they were to reſtore the Credit of their firſt Witneſſes; and it was with great Difficulty they granted a fourth probatory Term, and that was on the ſolemn Oath of the Party moving for it, and declaring upon ſuch Oath, that he or his Advocates had ſeen none of the Depoſitions, nor knew what was contained in them and over and above the Oath of *Juramentum Calumniæ*, ſwearing again that it was not done out of Vexation, nor to protract the Cauſe; (for it was highly preſumptive without an Oath that the deſiring the fourth probatory Term was to that Purpoſe) but after the fourth Dilation, there was to be no fifth probatory Term even *Juſſione divina*, that is to ſay, by the Emperor's Command. *Peers* 210. But the Canoniſts have relaxed this Notion of the three probatory Terms, and have put all into one.

Ibidem. The next Thing was the paſſing of Publication, and formerly the adverſe Party was cited to that Purpoſe, but afterwards the Uſe prevailed, to give a Rule to the adverſe Party to ſhew Cauſe in four Days, why Publication ſhould not paſs; and if he did not ſhew Cauſe within that Time, for prolonging the probatory Term, then Publication paſſed, and afterwards there could be no Examination of Witneſſes, unleſs

unleſs by ſpecial Direction of the Judge upon Cauſe ſhewn, and an Affidavit that he or thoſe employed by him had not, nor would not ſee the Depoſitions of the Witneſſes which were publiſhed, by Reaſon of the manifeſt Danger of Perjury and Subornation of Witneſſes, in Caſe Examination ſhould be allowed after Publication. *Marant.* 350, 351. *Gail* 184. *de Publicat.*

But after Publication there might be *Editio Inſtrumentorum* until the Concluſion in the Cauſe, becauſe there was no Danger of Perjury upon the Proof of ſuch notorious Inſtruments. *Ibidem.* Ibidem.

The Judge was not concluded by the Publication to examine either of the Parties upon perſonal Interrogatories, or to re-examine the Witneſſes themſelves. Ibidem.

Thus in our Courts of Equity when the Examinations are cloſed, the next Act is the paſſing of Publication, which properly ſpeaking, is that Power or Liberty which is given by the Court to the Philizer, or the Examiners, either upon Motion, or by Conſent of Parties, to ſhew the Depoſitions openly, and to give out Copies of them. Publication in Courts of Equity.

By the 45th general Rule when Witneſſes are examined, the firſt Rule for Publication is to be moved of courſe without Notice, and upon this Motion, RULE. Proceedings on obtaining Publication.

the Court will grant a conditional Order to ſhew Cauſe in four Days why Publication ſhould not be granted, and an atteſted Copy of this Order is to be ſerved on the adverſe Attorney; and when the Time for ſhewing Cauſe is expired, the Court, upon Counſel's Motion, and proper Notice given thereof, and upon producing the laſt Order, an Affidavit of the Service thereof, and a Certificate from the Chief Remembrancer of no Cauſe been ſhewn why Publication ſhould not paſs, will make the Rule for Publication abſolute.

On Delay in either Party in filing the Depoſitions, the other Party may put a Rule on him for that Purpoſe.

If the Party who iſſues a Commiſſion to examine Witneſſes delays to file Depoſitions, the adverſe Party (whether Plaintiff or Defendant) may put a Rule upon the other Party to return the Commiſſion, and file the Depoſitions in a ſhort Day.

When filed either Party may move for Publication but not before.

And when the Depoſitions are filed, either Party, Plaintiff, or Defendant, may move for Publication, but not before, or the Order for Publication will be ſet a ſide as irregular, upon Certificate and Motion.

If the Commiſſioners or any other refuſe or neglect to return the Commiſſion and Depoſitions, the Court will attach them.

If the Commiſſion and Depoſitions be not returned by the Commiſſioners in Time, the Court on Complaint thereof will attach the Commiſſioners (as they will any other Perſon who

who has them, and either detains, or refuſes to deliver them up,) for the Commiſſioners as to that Act are abſolutely the Officers of the Court, and as ſuch are ſubject to their Rules and Orders, and they are entitled to be paid for their Attendance, Trouble and Expence; the uſual Allowance is two Guineas a Day, for all.

What the Commiſſioners are entitled to for their Trouble, *&c.*

The Plaintiff forbearing to proſecute and move for Publication one Term, the next Term following the Defendant may move for Publication, and proceed thereon to a Hearing, *ex Parte Defendentis.*

RULE 1673. Plaintiff forbearing one Term to move for Publication, Defendant may do it next Term, and proceed to a Hearing.

In what Caſes new or additional Interrogatories may be exhibited to Witneſſes, and in what Caſes they may be examined after Publication.

BY the 39th general Rule, no new Interrogatories are to be admitted to examine any Witneſſes, after the ſame Witneſſes have been once examined, upon Interrogatories entered in Court for the ſame Party in the ſame Cauſe; neither are any Witneſſes at any Time (without Order of Court) to be examined in any Cauſe, after the Order for Publication is paſſed, and a Copy thereof

RULE. No new Interrogatories to examine a Witneſs already examined, nor is any Witneſs to be examined after the Order for Publication is ſhewn to the Examiner.

of ſent or ſhewn to the Examiner, altho' the Witneſſes be ſworn before ſuch Order be delivered.

And no Re-examination without Leave of the Court, or Conſent.

No Re-examination of Witneſſes is allowed, though upon the ſame Interrogatories, but on ſpecial Circumſtances, ſet forth by Motion and Affidavit; and if either Party have a Commiſſion, *de novo*, after he hath examined on a former, he muſt examine on the ſame Interrogatories, as were exhibited by him on the former Commiſſion, and no other Interrogatories can be admitted without an Order, or conſent of Parties. 2 *Ch. Ca.* 217.

In the Caſe of *Maxwell* againſt *Bond*, in *Chancery*, 27th of *July* 1743, Lord Chancellor ſaid, the Court would look into the Interrogatories, and if the new Interrogatory appeared to be proper, and not contained in the Interrogatories already exhibited, he would allow the new Interrogatory.

On a ſupplemental Bill, new Interrogatories may be exhibited with Leave of the Court, relating to the ſupplemental Matter only.

And on a ſupplemental Bill, the Court will, upon Counſel's Motion, give Leave to add to the firſt Interrogatories, ſo as the new Interrogatories contain nothing but what relates to the ſupplemental Matter.

In what Caſes an Examination may be after Publication has paſſed.

Although Courts of Equity will in no Caſe, after Publication paſſed, and the Purport of the Depoſitions known to the

the Parties, give Leave to examine any Witneſs, who has been already examined in the Cauſe, or any other Witneſs, to any Matter before examined to, from the Danger of Perjury; yet where either through Miſtake, Omiſſion, or Ignorance, ſome material Fact, in Iſſue, in the Cauſe, has not been examined to, and that this appears by Affidavit, and that it does not appear, that the Application is made, either from Vexation, or for Delay, and that there is no Danger of Perjury in the Caſe, the Court will on ſpecial Application, by Council, (upon Notice for that Purpoſe,) give Leave to examine, even after Publication has paſſed, upon additional Interrogatories, to be ſettled by a Baron. So determined in this Court, upon ſolemn Debate, *Trinity* Term 1758, in the Caſe of the Attorney General againſt *Carden* and others, on an *Engliſh* Information, for a forfeited Eſtate; and the Court declared, they would have made the ſame Rule, had it been between common Perſons, and the Crown not concerned, it being for the Benefit of all Parties, for that if the Cauſe had been brought to a Hearing, the Court would have directed an Iſſue to have tried the Facts omitted to be proved.

And in 2 *Vern.* 197. 249, it is ſaid, that where the Baron and Feme exhibit a Bill, for a Demand, in Right of the Wife, Ibidem.

Wife, the Defendant's Anſwer, and the Cauſe being at Iſſue, ſeveral Witneſſes are examined, and Publication paſſes; but before it proceeds to a Hearing, the Huſband dies, and the Feme marries a ſecond Huſband, and they bring a new Bill for the ſame Matter, the Wife ſhall not be bound by the Proceedings, in the former Cauſe, and they may examine again the ſame Witneſſes, as were examined in the former Cauſe.

Ibidem. But if Plaintiff dies after Publication, his Executors cannot exhibit a new Bill, on the ſame Matter, to make further Proof.

Ibidem. And where a Bill was brought for a Legacy, againſt Baron and Feme, who was Executrix of the Teſtator, the Defendant anſwers, Witneſſes are examined, and Publication paſſed; afterwards the Huſband dies, it was held by the Court, that in this Caſe there is no Abatement, and the Wife ſhall be bound by the Anſwer and Depoſitions; but it might be otherwiſe, if the Wife's Inheritance was in Queſtion. 2 *Vern.* 249.

Additional Interrogatories, and the Proceedings in obtaining Leave to exhibit them. Each Party may produce Interrogatories, or further Interrogatories, until the Examination is opened; but where either Party would exhibit an additional Interrogatory, after the Examination is begun, though it be before the Order for Pub-

Publication is paſſed, there muſt firſt be an Order obtained for that Purpoſe, which the Court will grant of courſe upon an Attorney's Motion; but if the Order for Publication be paſſed, then the Motion is to be made by Counſel, for Liberty to exhibit the additional Interrogatory, on an Affidavit of the Perſon who makes the Application, that he hath not directly, or indirectly, come to the Knowledge of what has been ſworn by the Witneſſes, who have been examined; and Notice of the Motion muſt be given to the oppoſite Party, and if the Court grants the Motion, it is referred to a Baron, to ſettle the Interrogatory; and if Copies of the Depoſitions be not given out, the Court will reſpite Publication.

To be ſettled by a Baron on Reference to him.

Though the Rule be, that after Publication, no new Witneſs can be examined, nor a Witneſs before examined, re-examined, yet on ſpecial Circumſtances, ſet forth by Motion and Affidavit, and that the Party applying, his Agent, or Solicitor, hath not ſeen, heard, read, or been informed, of any of the Contents of the Depoſitions in the Cauſe, and will not ſee, *&c.* the Rule may be diſpenſed with. 1 *Ch. Ca.* 228. 2 *Ch. Ca.* 75.

A Witneſs may on ſpecial Circumſtances be examined after Publication.

Upon a Motion for Leave to examine after Publication, upon making the uſual

But the other Party ſhall be at Liberty to exa-

mine at large, as well as croſs-examine.

uſual Oath, of not having ſeen the Depoſitions, the Lord Keeper declared, That in ſuch a Caſe, the other Side ſhould be at Liberty to examine at large, as well as croſs-examine, the Witneſſes produced by the Party that made the Motion, (which was all he might do formerly) and his Reaſon was, that a crafty Solicitor may lie on the Lurch, and examine nothing till after Publication is paſt, and the other Party may think himſelf ſecure, and ſo not examine to thoſe Points, which he could otherwiſe have proved, in regard he finds his Adverſary has not examined to theſe Matters; and when once Publication is paſſed, and the Party that examined, has ſeen his own Depoſitions, then the Side that lay ſtill (having tied up his Adverſary, ſo that he can only croſs-examine the other Witneſſes) applies for an Order upon the uſual Affidavit, to enlarge Publication, and when he has got that Order, then he comes in with a whole Cloud of Witneſſes: And though it might be thought hard, that any one ſhould have Liberty to examine after he has ſeen the Depoſitions, yet his Lordſhip thought it a reaſonable Penalty, on ſuch as would not examine in Time; or that ſhould lie on the Catch, to take Advantage of the other Party; and ordered the Regiſter to take Notice of it, as a fixed Rule for the future. *Mich.* 1684. 1 *Vern.* 253.

But

But Matters in Iſſue, in the original Cauſe, and Publication paſſed, or ſettled by the Decree, cannot be examined to, in the Croſs-cauſe. *Moſeley's Rep.* 382. *Curs. Canc.* 323, 324. 327. 1 *Ch. Ca.* 25. 155. 233. 234. 2 *Ch. Ca.* 75. 79. 217. 1 *Vern.* 253. 2 *Vern.* 409.

Matters examined to in the original Cauſe, and Publication paſſed, or ſettled by the Decree, cannot be examined to in the Croſs-cauſe.

Interrogatories and the Depoſitions of a Witneſs taken on them, had been ſuppreſſed, for that the Interrogatories were leading, and then Publication paſſed, and the Court was moved that a new Sett of Interrogatories might be drawn and ſettled by the Maſter, for the Examination of this Witneſs whoſe Evidence was very material, and yet muſt be wholly loſt unleſs the Court would indulge them this Way: And though the Practice was admitted to be always againſt it, and it was urged, to be of dangerous Conſequence, yet one Precedent being produced to this Purpoſe, and the Interrogatories which had been ſuppreſſed, being ſuch as might be drawn by many other Counſel, without any Apprehenſion of their being leading; the Court, to let in the Party to the Benefit of his Witneſs's Teſtimony, ordered Interrogatories to be put in, to be firſt ſettled by a Maſter, for his Examination over again. *Trin.* 1718, between *Spence* and *Allen*. *Bac. Equ. Ca.* 232.

After Depoſition ſuppreſſed, the Witneſs examined again on a new Sett of Interrogatories, ſettled by a Maſter.

In

New Interrogatories may be exhibited when the Examination is by an Examiner, but not when it is by Commiſſion, and the Reaſon.

In *Bacon's Equ. Ca.* Pa. 233, it is ſaid, that in the Caſe of *Andrews* and *Brown, Paſch.* 1714, it was agreed by the Court and Bar, that if Interrogatories are exhibited in the Examiner's Office, and Witneſſes examined thereon, either Party may without Application to the Court, or Order for that Purpoſe, exhibit one or more Interrogatories, or a new Sett of Interrogatories, for further Examination of the ſame, or other Witneſſes: But when a Commiſſion is taken out there; no new Interrogatories, or Sett of Interrogatories, can be exhibited without Motion, and Order of the Court: And the Reaſon of the Difference is, becauſe the Examiner is an Officer of Credit, and ſworn, and therefore preſumed to be impartial, and that he will not diſcloſe the Depoſitions; beſides, as has been ſaid before, the Examination by him, is preſumed to be the Examination of the Judge: Whereas Commiſſioners are private Perſons, and therefore, without Leave of the Court, no new Interrogatories can be added before them. *Sed Quær.* if this muſt not be before any Order for Publication hath been ſent, or ſhewn to the Examiner. *Vide Antea*, Pa. 616. 618.

Interrogatories may be exhibited after Hearing, in Aid of an Account.

Although by the Orders of the Court, the Parties are to make their full Proof before Publication and Hearing of the Cauſe;

Cauſe; yet after Hearing, if there be a Reference to the Officer, for the Stating an Account, or ſuch like Matter, the Parties, or either of them, may examine Witneſſes, in Aid thereof.

No Examining of Witneſſes, on a Bill brought to have the Benefit of a former Decree.

In a Bill brought to have the Benefit of a former Decree, the Plaintiff cannot examine Witneſſes, much leſs the ſame Witneſſes, to the Matters in iſſue, in the former Cauſe. But on ſuch a Bill, the Court may examine the Juſtice of the former Decree; but then it muſt be upon the Proofs taken in the Cauſe, wherein that Decree is made, and not upon any new Proofs. 2 *Vern.* 409.

Examination of Witneſſes, de bene eſſe.

Witneſſes examined *de bene eſſe*, and the Proceedings.

EXAMINATION *de bene eſſe*, is uſed on other Bills, than barely to perpetuate Teſtimony; for after a Bill filed in any Cauſe, if it ſhall happen, that there is a material Witneſs for either Plaintiff, or Defendant, who is aged, or infirm, ſick, or going beyond Seas, ſo that the Party is in Danger of loſing his Teſtimony, the Court, upon an Affidavit of theſe Circumſtances, and on

Motion of Counſel thereon, will order him to be examined, *de bene eſſe* *.

Ibidem. And in this Affidavit, the Chriſtian and Surnames, Place of Abode, Addition, or Occupation of the Witneſſes muſt be ſet forth; for otherwiſe, the oppoſite Party has no Opportunity of contradicting the Affidavit; nor can the Perſon who makes it, be indicted for Perjury, though he ſhall have ſworn falſely.

The Depoſitions thereon, only to affect the Parties in the Cauſe, or Perſons deriving under the ſame Title. The Depoſitions on this Examination ſhall affect thoſe only who are Parties to the Suit, or who derive under the ſame Title; but if it appear that the Witneſſes might have been afterwards examined in chief, regularly ſuch Depoſitions ſhall not be made uſe of. 1 *Williams*, 568, 569.

Defendant may join in Commiſſion, and croſs-examine. If the Defendant be not in Court, when this Application is made by the Plaintiff, he may come in by Appearance, and join in Commiſſion, and croſs-examine the Plaintiff's Witneſſes. 2 *Har. Ch. Pract.* 41.

So

* Of this Motion, Notice is ſometimes required, and often not, according to the Circumſtances of the Caſe; it is not neceſſary, where a Defendant is in Contempt, ſo that the Plaintiff could not join Iſſue, but where the Defendant is in Court, and hath given no Delay, it is ſaid that Notice ought to be given: Alſo, generally, where the Application is on Behalf of the Defendant.

So may the Plaintiff alſo croſs-examine the Defendant's Witneſſes on ſuch an Examination, on behalf of the Defendant.

So may the Plaintiff.

A Witneſs may be examined *de bene eſſe*, though neither old, infirm or going abroad, according to the Circumſtances of the Caſe; as where a Perſon is the only Witneſs, who has any knowledge of the Forgery of a Deed, or other material Fact; for otherwiſe, if he dies before he is examined in chief, the Proof of the Fact is gone. *Curſ. Canc.* 275. 294. 300. *Pract. Reg. in Chanc.* 166. *Moſeley's Rep.* 390.

A Perſon may be examined *de bene eſſe*, though neither old, infirm, or going abroad.

But note, after the Defendant hath anſwered, the Court will not, unleſs on ſome extraordinary Circumſtances, give the Plaintiff leave to examine, *de bene eſſe*, as he may immediately reply, and examine the Witneſſes, in the uſual Manner.

After Anſwer the Court ſeldom give the Plaintiff leave to examine *de bene eſſe*.

A Cauſe having been heard, and referred to an Account, the Plaintiff afterwards moved to examine two of the Defendants *de bene eſſe*, which was ordered unleſs Cauſe was ſhewn; and the Defendants Counſel in ſhewing Cauſe, took this difference, *viz.* that although it was an Order of courſe, to examine a Defendant, *de bene eſſe*, ſaving juſt Exceptions;

A Defendant may be examined *de bene eſſe*; but if he be intereſted, it may be ſhewn as Cauſe againſt his being examined.

tions; yet when the Cauſe was open, and it appeared that the Defendants were Parties intereſted, it was proper to ſhew it as Cauſe againſt ſuch an Order before the Witneſſes were examined; which Difference was allowed of: But it appearing in this Caſe, that the Defendants had given Releaſes of their Right, the Cauſe was diſallowed. *Paſch.* 1687, between *Glover* and *Faulkner*. 1 *Vern.* 452.

Theſe Depoſitions if publiſhed or made uſe of againſt a Witneſs examined *de bene eſſe*, the Witneſs ſhould have a Copy of them, before he is examined in chief.

If the Depoſitions, *de bene eſſe*, are to be publiſhed, or any Ways made Uſe of againſt a Witneſs ſo examined *de bene eſſe*, ſuch Witneſs ought to have a Copy of the Depoſitions before he is examined in chief; to the Intent that he may have due cautionary Means allowed him to prevent his contradicting himſelf; and this is always done. 1 *Williams*, 569. *Cam* againſt *Cam*.

If contradictory, yet not Perjury at Law.

And in this Caſe, Lord Chancellor *Parker* declared, that many Queſtions might ariſe, if it ſhould happen that the Depoſitions *de bene eſſe*, were quite contradictory to the Depoſitions in chief; but his Lordſhip ſaid, he did not think it could be Perjury at Law *, there being no

* *Cro. Cha.* 352. 3 *Inſt.* 167. And yet it ſeems as if ſuch Depoſitions *de bene eſſe*, upon a Bill to perpetuate the Teſtimony of Witneſſes, where there is no Iſſue joined, on the Death of the Witneſs, may be read in Evidence. *Carth.* 265.

no Iſſue joined as there muſt be before the Depoſitions are taken in chief.

A Plaintiff not to be examined, *de bene eſſe*, tho' a Defendant may.

The Court cannot make an Order to examine a Plaintiff *de bene eſſe*, ſaving juſt Exceptions, though they will make ſuch Order to examine a Defendant; but the Defendant ought to have demurred to ſuch immaterial Plaintiff. 1 *Williams*, 595.

Depoſitions of Witneſſes examined *de bene eſſe*, ordered to be read on a Trial at Law.

The Plaintiff examined his Witneſſes, *de bene eſſe*, in *Mich.* Vacation, and in *Hillary* Term following, the Defendant put in his Anſwer; and five Weeks afterwards, before any Replication filed, or Examination in chief, the Witneſſes died; and it was moved that this Depoſition might be read; and it was likewiſe prayed that it might be made Uſe of at Law, (although by the ſtrict Rules of the Common Law, no Depoſitions of Witneſſes taken *de bene eſſe*, or before Iſſue joined, can be read or given in Evidence) and that the Defendant might be ordered not to oppoſe the Reading of it at the Trial there, which my Lord Keeper held reaſonable, for that otherwiſe an Examination, *de bene eſſe*, would be to no Purpoſe. 1 *Vern.* 331.

The Proceedings to publiſh the Depoſitions *de bene eſſe*, if the Witneſs dies,

If the Witneſs lives till he can be examined in chief, he muſt be examined over again, as other Witneſſes in chief are; but if he dies in the mean Time,

before he could be examined in chief.

then the Party, for whoſe Benefit he was examined, may (proper Notice being firſt given to the oppoſite Attorney) apply by his Counſel for Liberty to publiſh the Depoſitions, and if the Death of the Witneſs be ſufficiently proved, and if it appears that he died before the Time he could be examined in chief, the Court will thereupon make an Order, not only to publiſh his Depoſitions, but to read him as a Witneſs at the Hearing, ſaving Exceptions.

Or before he return from abroad.

If the Witneſs beyond Sea, be not returned, there muſt be an Affidavit of it; and that the Party hath not heard from him of ſuch a Time, and that he doth not know whether he be living or dead; and in this Caſe there will be the like Order, as in the Caſe of the Witneſs who died before he could be examined in chief. 2 *Bacon*, 305.

On Bills taken as confeſſed, Plaintiff may examine *de bene eſſe*.

For the method of examining Witneſſes *de bene eſſe*, on Bills taken as confeſſed, in Cauſes heard upon Sequeſtrations, and the Proceedings thereon, purſuant to the Statute, 7 *Geo.* 2. Ch. 14, ſee the Proceedings on ſuch Hearings, under *Title Hearing*.

Letter

Letter Miſſive.

A LETTER MISSIVE is an Epiſtle directed from the Court to the Defendant, being a Peer, or a privy Counſellor, requiring him to retain an Attorney of the Court to appear for him at a certain Day therein limited. And it is made returnable, either on one of the Return-days in Term, or at a certain Day in Term, or in the four Days after *Eaſter* Term, or in the eight Days after any other Term; and it is to be dated in Term, or in the four or eight Days after Term, and to be ſigned by two of the Barons at leaſt, of which the Chief Baron (if he be in Town) to be one *.

Letter Miſſive, what, and how to be teſted, and returned, and prepared.

RULE.

Subpœna if no Appearance on the Letter Miſſive.

By the 3d general Rule, *Supœnas* upon Letter Miſſive are to iſſue of courſe, Affidavit of the Service of the Letter

* When the Practice was introduced of ſending a Letter to a Peer inſtead of a *Subpœna*, *non Conſtat*; Mr. *Selden* ſays, 6 Vol. 1543, that it was the Courſe in the Star Chamber of *Chancery*, to pray ſuch a Letter in a Bill againſt a Peer; poſſibly that Practice being begun in the Star Chamber, on the Erection of that Court, towards the End of *Henry* the Eighth's Reign, might be afterwards followed in Courts of Equity. No mention of any Proceſs but a *Subpœna* is made in the Year Books, or *Doctor* and *Student*; but in *Weſt Symb.* S. 21, it is taken Notice of as the Courſe in *Chancery*. 36 *Eliz.* See *Comyns*, 675.

Miſſive, being firſt made and filed in the Office †.

This

† It has been practiſed, theſe many Years, to iſſue Letters Miſſive, and the *Subpœnas* at the ſame Time, only the *Subpœna* is made returnable at a Day after the Return of the Letter Miſſive; but this Alteration ſeems ſomewhat extraordinary, for the Letter Miſſive was founded on a Reſpect which is thought due to the Peerage engaged in publick Affairs, and who are ever ſuppoſed to be more attentive to the Summons of Juſtice than Men of lower Degree, that they ſhould have Notice before the ordinary Proceſs iſſued againſt them; and it is ſo expreſſed in the Letter Miſſive; which is not the Caſe, if they are ſerved with a *Subpœna* at the ſame Time that the Letter Miſſive is delivered to them; and yet it is agreeable to the Practice in *Chancery*.

And in the Caſe of the Adminiſtrator of *Newenham*, againſt the Earl of *Wandesford*, *Trinity* Term 1759, it was determined, on full Conſideration of the Court, that notwithſtanding the old Rule was, that the *Subpœna* was to be firſt ſerved, and that upon Affidavit thereof, the Letter Miſſive only could iſſue; yet as the Practice for many Years has been otherwiſe, and as the Inconveniencies might be extremely great from the Delay, eſpecially in Caſes of Injunctions to ſtop Proceedings at Law, where, if the Peer ſhould be at a great Diſtance from *Dublin*, or ſhould not pay the due Regard to the Compliment, or even from the delay which muſt be of courſe, if the Rule be purſued, a Man may unjuſtly be deprived of his Liberty for a whole long Vacation; and this for the ſake of Preciſeneſs, or a rigid Nicety in a meer Matter of Compliment; the Court therefore, thought it more for the publick Convenience (far worthier of Conſideration) to neglect the Rule, and adhere to the Practice, and eſpecially as the Officers of the Court, and ſeveral old Practitioners declared it had been

This Letter is but a * Compliment, and not Proceſs to found Proceedings upon; and the Peer may appear, or not appear at the return thereof, as he pleaſes; for, by the 4th general Rule, he has four Days after the Return of the *Subpœna* to appear, and four Days more to anſwer before any compulſory Proceedings can be had againſt him. And note, the Letter itſelf is to be delivered to the Peer, but it will be proper to keep a Copy thereof, in order to draw an Affidavit of ſervice thereon, if it ſhould be neceſſary.

This Letter a Compliment.

RULE. The Time Defendant has to appear and anſwer.

How the Letter is to be delivered.

The Peer is alſo to be ſerved with an atteſted Copy of the Bill, and if the Defendant doth not appear within the Time before mentioned, then, upon Certificate thereof, and of the Time the Bill was filed, and upon an Affidavit of the Service of the Letter Miſſive and *Subpœna*, and of having delivered an atteſted Copy of the Bill to the Defendant, the Plaintiff's Counſel may move that a

A Copy of the Bill to be alſo ſerved on the Peer, and how to proceed, if the Peer does not appear, *&c.*

een ſo theſe thirty Years: It is true, in the Law ide o this Court, the Proceedings are agreeable the old Rule here, but the ſame Inconveniencies nnot attend it there; and ſo it is in the *Chancery England.* See 1 *Har. Chan. Pract.* 51.

* The Citation at the Canon Law was twold, *Verbalis*, which was not in Writing, or *per uncium*, but if the Deponent was *Perſona illuſtris, clariſſima*, the Citation was to be in Writing, it was the moſt reſpectful Manner of Application.

a * Sequeſtration may iſſue againſt the Defendant being a Peer, if he does not appear and anſwer, by the Time that Proceſs to a Sequeſtration might iſſue againſt a Perſon not intitled to Privilege, and the Court will make an Order for that Purpoſe; and this Order is to be ſerved on the Defendant; and if he ſtill neglects to appear, the Proceſs ſhall iſſue purſuant to the Order.

Or if he appears, and neglects to anſwer,

So likewiſe, if the Defendant appears, but afterwards neglects to anſwer in Time, the Court, upon Motion of Counſel for the Plaintiff, will make the ſame Order, upon producing a Certificate of the Appearance, and that no Anſwer is filed. For the further Proceedings, ſee Title *Privileged Perſons and Bills taken pro Confeſſo.*

What Perſons are intitled to Letters Miſſive.

The Perſons intitled to Letters Miſſive, are Peers of the Realm, and privy Counſellors, ſo are Dutcheſſes, Counteſſes and Baroneſſes, though they marry under Degree of Nobility; but if the Woman obtains Nobility by the Marriage

* Heretofore on the Default of the Defendant, being a Peer, in appearing, or anſwering, it was uſual, according to the 4th general Rule, to move for a Fine; and when a ſecond Fine was impoſed, to have an Attachment upon Motion, and after that, all the other Proceſs of Contempt to iſſue of Courſe; but this Method of Proceeding has been diſuſed for ſome Time, and the preſent Practice ſubſtituted.

riage of a Duke, *&c.* and after his Death marry under Degree of Nobility, ſhe loſeth the Dignity of her firſt Marriage, and is not to be ſerved with a Letter Miſſive. See *Co. Lit.* Sect. 9. Pa. 16. *E. F.* 6 *Co. Rep.* 53. See my Practice of the *Law Side of the Exchequer*, Vol. 1. Pa. 15, *&c.* and 85, *&c.*

Letters Miſſive, the Proceedings thereon in the *Chancery* in *England.*

In the *Chancery* in *England*, if a Peer after being ſerved, fails to appear upon Affidavit of Service, and Certificate of no Appearance, the Court, on Motion, grant a Sequeſtration, unleſs Cauſe in eight Days after perſonal Service; and if no Cauſe is then ſhewn, the Sequeſtration is made abſolute. See *Har. Ch. Pract.* Vol. 1. 317. And it is ſaid, that it is neceſſary to take out an Attachment to ground a Sequeſtration upon, though it is not to be executed.

No Attachment againſt a Woman who was a Peereſs, but loſt her Privilege by marrying a Commoner without Leave of the Court.

But note, a Woman, who was a Peereſs by Marriage, but hath loſt her Privilege by marrying a Commoner, ſhall be ſerved with Proceſs as a common Perſon, and ſhall neglect or refuſe to appear thereto, in ſuch Manner as ſhe was intitled in the Proceſs, the Plaintiff ſhall not enter an Attachment againſt her without Leave of the Court, upon a ſpecial Motion for that Purpoſe. See the Caſe of *Gaſh* againſt *Cath. Pierce*, commonly called Lady *Barrymore* in this Court, 22d *June*, 1730.

This

Decree ſerved on Peer needs no Letter Miſſive.

This may be a proper Compliment before the Party is in Court, but when he has appeared and anſwered, and a Decree is againſt him, it ſeems moſt proper to demand Obedience to it by Proceſs of the Crown, than by Letter from the Barons. *Comyns*, 676. See Title *Privileged Perſons*.

What Rights, Actions, or Demands, are deemed in, or out of the Statute of Limitations in Equity.

What Suits are limited by the Statute, and what not.

BY the 10th *Cha.* 1ſt. Seſſ. 2d. Ch. 6, all Actions upon the Caſe, other than for Slander, Actions of Account (other than what concern Merchandiſe, between Merchant and Merchant) Actions of Treſpaſs, *Quare Clauſum fregit*, Debt upon lending or Contract, without Specialty, for Arrearages of Rent, for Detinue, Trover, Replevin, ſhall be commenced within ſix Years after the Cauſe of Action, and not after. But the Right of *Infants*, *Feme Coverts*, *non compos Mentis*, Perſons impriſoned, or beyond Sea, is ſaved; ſo that they commence their Suits within the Time above limited, after their Imperfections removed;

Rights ſaved.

removed; provided, that if in any ſuch Actions, Judgment is given for the Plaintiff, and the ſame is reverſed for Error; or if a Verdict paſs for him, and, upon Motion in Arreſt of Judgment, it is given againſt him; or if the Defendant is outlawed in the Suit, and does after reverſe the Outlawry; in theſe Caſes the Plaintiff, his Heirs, *&c.* may commence a new Action within a Year, and not after.

A Proviſoe that Plaintiff may commence a new Action within a Year after Judgment reverſed, a Verdict ſet aſide, or an Outlawry reverſed.

And by 6 *Ann.* Ch. 10, the Plaintiff's Right is as much ſaved, when the Defendant is beyond Sea, as if he were ſo himſelf; provided he brings his Action within ſuch Time after his return, as is limited by the aforeſaid Statute. 10 *Cha.* 1ſt. Ch. 6.

Plaintiff's Right ſaved, when the Defendant is beyond Sea.

And by 8 *Geo.* 1ſt Ch. 4, in Actions of Debt on Specialties, Judgments, Statutes, *&c.* due twenty Years, and no Action commenced in that Time for the ſame, nor no Intereſt, *&c.* paid, the Defendant may plead Payment in Bar.

Debt on Specialties, Judgments, *&c.*

And Mortgagees twenty Years in Poſſeſſion, may plead it in Bar to any Action, by the Perſon intitled to the Equity of Redemption.

Mortgagees twenty Years in Poſſeſſion.

And, by the ſaid Statute, all Perſons not already bared, claiming any Eſtate, *&c.* or Incumbrance on any Lands, *&c.* not being in Poſſeſſion for twenty Years by

Limitation of Suits for Recovery of Lands, or Incumbrances thereon.

by themſelves, or thoſe under whom they claim, and not commencing an Action for the ſame before the 12th of *September*, 1726, are for ever barr'd.

Rights ſaved.

But in this Act there is a Saving for Perſons who ſhall commence an Action in five Years after the Title accruing.

Ibidem.

And the Right of Infants, *Feme Coverts*, *non compos Mentis*, Perſons impriſoned and beyond Sea, and their legal Repreſentatives is ſaved, ſo that they commenced their Suits within the Time above limited, after their Imperfections are removed.

Infant barr'd from an Account of Profits, by not entering ſix Years after he comes of Age.

An Infant who neglects to enter ſix Years after he comes of Age, is as much barred by the Statute of Limitations from bringing a Bill for an Account of Profits, as he is from an Action of Account at Common Law. *Preced. in Chanc.* 518.

Legacies not within the Statute of Limitations.

A Legacy is not within the Statute of Limitations, and there is this Difference between Debts and Legacies, as to their Antiquity, Legacies always appear upon the Face of the Will; and ſo an Executor knows what he ought to pay, without being aſked or told: But for Debts, and other dormant Demands againſt which he cannot provide without Notice, there the Statute had Reaſon to Limit the Time. 1 *Vern.* 256. *Sed Vid.* 2 *Vern.*

2 *Vern.* 21, where, after a great Length of Time, a Legacy ſhall be preſumed to be paid.

And no Length of Time will bar a Fraud in Equity, and a Plaintiff, after ſix Years, is intitled to a Diſcovery of a Fraud; and where there is a plain Fraud, the Plaintiff may take Advantage of it at Law. *Talbot's Rep.* 63. *Moſeley's Rep.* 18. 245. *Nelſ. fol. Rep.* in *Canc.* 14. 266. A Fraud, a Bar to the Statute at Law, and in Equity.

A Truſt is not within the Statue of Limitations. *Bac. Equ. Ca.* 303. 2 *Williams Rep.* 145. 374. A Truſt not within the Statute.

The Plaintiff exhibited a Bill to have an Account of Money received by the Defendant from his Father, (whoſe Executor he was,) who gave it to compound for his Eſtate, ſequeſtred for Delinquency at *Goldſmiths-Hall*; and it was ordered accordingly; the Court declaring it a Truſt, and therefore not within the Statute of Limitations. *Mich.* 15. *Cha.* between *Sheldon* and *Weldman*, 1 *Ch. Ca.* 26. Ibidem.

So, where Lady *Hollis* lent 100 *l.* and the Note, which was given for it, mention was made that it ſhould be diſpoſed of as ſhe ſhould direct; and a Bill being exhibited for it, the Court held it a *Depoſitum* or Truſt, and decreed Payment of it, tho' otherwiſe it was barred Ibidem.

by

by the Statute of Limitation. 2 *Vent.* 345.

Nor an implied Truſt.

The Plaintiff, who was Son and Executor of Chief Juſtice *Heath*, who was made Chief Juſtice at *Oxon*, during the Difference between the King and Parliament (but never ſat in *Weſtminſter-Hall*) exhibited a Bill againſt the Defendants Prothonotaries of the *K. B.* at that Time, to have an Account of the Money, *&c.* received by them at that Time *Virtute Officii*; to which the Defendants pleaded the Statute of Limitations; but, upon Argument, the Plea was over-ruled. 1 *Ch. 2d.* between *Sir Edward Heath* and *Henly*, and others. 1 *Ch. Ca.* 20. 3. *Ch. Rep.* 8. *S. C.*

Nor a Charity.

A Charity is not within the Statute of Limitations. 1 *Vern.* 256.

Nor accounts current or open, but ſtated Accounts are.

The Statute of Limitations is no Plea in Bar to an open or current Account. *Paſch.* 1687, between *Scudmore* and *White.* 1 *Vern.* 456. But Accounts ſtated between Merchant and Merchant, are barred by the Statute 89, 90. 2. *Saund.* 124.

If a Bill in Equity abates by Death, Executor or Adminiſtrator muſt revive in ſix Years, or he is barred by the Statute, but not after a Decree to an Account.

Where a Bill in Equity abates by Death, if the Executor or Adminiſtrator will not revive within ſix Years, it is within the Statute of Limitations; but if there be a Decree to an Account, and the Suit afterwards abates by Death and

and the Executor does not revive within ſix Years, this is not within the Statute. 1 *Williams* 742.

Where the Time begins againſt a Creditor in the Life Time of the Anceſtor, or Teſtator, it goes to the Executor or Heir.

In the Caſe of *Vaughan* againſt *Guy*, *Moſeley's Rep.* 245, it was ſaid, that it was reſolved by the Maſter of the Rolls, and affirmed on an Appeal to Lord *Macclesfield*, that where the Time begins to run againſt a Creditor in the Life Time of the Anceſtor, or Teſtator, it goes on as to his Executor or Heir.

The Statute of Limitations extends to Attornies Bills.

And in the ſame Caſe it was ſaid, that it has been reſolved, that the Statute of Limitations will extend to Attornies Bills, though they are Things done of Record.

Where there is no Latches in the Plaintiff, the Statute of Limitations ſhall not prejudice.

If there is no Executor againſt whom the Plaintiff may bring his Action, he ſhall not be prejudiced by the Statute of Limitations, nor ſhall any Latches in ſuch Caſe be imputed to him.

If a Suit pending in Equity will prevent the Statute of Limitations from being pleaded at Law.

If a Man ſues in *Chancery*, and, pending the Suit there, the Statute of Limitations attaches on his Demand, and his Bill is afterwards diſmiſſed, the Matter being properly determinable at Common Law; in ſuch Caſe the Court will preſerve the Plaintiff's Right and will not ſuffer the Statute to be pleaded in Bar to his Demand. 1 *Vent.* 73. *Sed vide* 2 *Ch.* Rep. 217. *E Contra*, where it is ſaid, if

a Suit be in *Chancery* for a Debt for Rent, by Leaſe, Parol, or ſimple Contract, and beginneth within Time of Limitation, and is diſmiſſed after the Time of Limitation, the Court will not order the Defendant to take no Advantage of the Statute of Limitations: But if in ſuch Caſe, the Party be ſtayed by Act of the Court, as by Injunction, *&c.* it is otherwiſe; for the Act of the Court ſhall do no Prejudice, as in Caſe of Demurrers at Common Law.

The Benefit of this Statute inſiſted on by way of Anſwer, ſhall avail the Defendant at the Hearing as if pleaded.

Where a Defendant inſiſts on the Benefit of the Statute of Limitations by way of Anſwer, he ſhall at the Hearing, have the like Benefit as if he had pleaded it. 2 *Williams* 145.

Where Rights, Actions, or Demands, once barred by the Statute of Limitations, may be revived and ſet up again.

A Debtor who publiſhes an Advertiſement in a News-paper that all Debts due from him ſhall be paid, by this a Debt barred by Statute ſhall be paid.

IF a Man has a Debt due to him by Note, or Book Debt, and has made no Demand of it for ſix Years, ſo that he is barred by the Statute of Limitations; yet if the Debtor after the ſix Years, puts out an Advertiſement in the Gazette, or any other News-paper, that all Perſons who have any Debts owing to them from him may apply to ſuch a Place, and that they ſhall be paid; this (tho

(tho' general and may be intended of legal ſubſiſting Debts only) yet amounts to ſuch an Acknowledgment of that Debt which was barred, as will revive the Right and bring it out of the Statute again. *Preced.* in *Chanc.* 385. *Quær.* if in the Advertiſement it had been ſaid lawful Debts.

If one by Will directs that his Debts ſhall be paid, or makes a general Proviſion for the Payment, he thereby revives a Debt barred by the Statute, and makes his Executors liable.

So if in that Caſe, the Debtor had made his Will and thereby directed, that all his Debts ſhould be paid, or made any Proviſion for his Debts in general; this likewiſe would revive ſuch a Debt, and bring it out of the Statute, ſo that his Executors would be liable to the Payment of that Debt amongſt the reſt. *Ibidem. Sed Quær, vid. Moſeley's Rep.* 245, where the Teſtator made his Will, (*Inter al.*) in theſe Words, "All "the reſt and Reſidue of my Eſtate, after payment of my Debts and Funeral Expences, I give to my Executors, *&c.*" and on the Statute being pleaded to a Bill filed by a Creditor in this Caſe, it was ſaid that theſe Words in a Will, are no more than Words of courſe, and what the Law ſays. Where the Lands are indeed deviſed to Executors in Truſt to pay Debts, the Teſtator creates a new Fund, and the Nature of the Debts are altered, and they are to be paid equally. 2 *Vern.* 141. *Goſton* againſt *Mill*; and great Inconveniencies would follow if this Will ſhould revive the Debts, or

prevent the Executors from paying other Creditors, and enable them to pay Debts, that to pay otherwiſe would be a *Devaſtavit*; but where Lands are deviſed, no Creditor can complain becauſe a new Fund is created. *Sed vide poſt.*

A Promiſe to pay a Debt which is barred by the Statute, ſufficient to maintain an *Aſſumpſit*; but a bare Acknowledgment not.

So, if after the ſix years the Debtor, upon Application for that particular Debt, acknowledges and promiſes Payment (for a bare Acknowledgment has been ruled not ſufficient) this revives the Debt, and brings it out of the Statute; becauſe as the Note itſelf was at firſt but an Evidence of the Debt, ſo that being barred, this Acknowledgment and Promiſe is a new Evidence of the Debt, and being proved, will maintain an *Aſſumpſit* for recovery of it; and it was agreed that a little Matter would bring a Debt out of the Statute, being to reſtore a Right. *Preced.* in *Ch.* 386, between *Andrews* and *Brown.*

If Lands deviſed in Truſt to pay Debts, or ſubjected by Will or Deed to the Payment of Debts, will revive a Debt barred by the Statute.

If a Man owing a Debt by ſimple Contract, barred by the Statute of Limitations, deviſes Lands in Truſt to pay his Debts; this tho' barred by the Statute, is revived by his Will. 2. *Williams* 373. And if a Man by Will or Deed, ſubject his Lands to the payment of his Debts, Debts barred by the Statute of Limitations ſhall be paid; for they are Debts in Equity, and the Duty remains; the Statute hath not extin-

tinguiſhed that tho' it hath taken away the Remedy. 1 *Salk.* 154. 278. 2 *Vern.* 141. *Sed vide Moſeley's Rep.* 391. The Caſe of *Legaſtick* againſt *Cowne*, *Trin.* 1730, where the Teſtator deviſed his Lands to two Executors equally to be divided between them, willing them to pay his Debts; and to a Bill brought by a Creditor, the Executors pleaded the Statute of Limitations; and in this Caſe Lord Chancellor *King* ſaid he knew Lord *Cowper* was of Opinion, that where Lands were deviſed in Truſt for the Payment of Debts, Debts barred by the Statute ſhould be paid; but that to his Knowledge the Lords were of another Opinion in the Caſe of the Earl of *Stafford*. And his Lordſhip ſaid he knew no Power a Court of Equity has to controll an Act of Parliament; and if Lands are given to Executors for Payment of Debts, they are as much legal Aſſets as the perſonal Eſtate; and that he would not under the Notion of a Truſt ſubvert the Statute, and that the Debt had been due to the Plaintiff ſince 1707; and his Lordſhip allowed the Plea.

If a Man deviſe all the reſt and Reſidue of his perſonal Eſtate after Debts and Legacies paid to *J. S.* and ſeveral of the Creditors are barred by the Statute of Limitations, who notwithſtanding bring Actions againſt the Executor, and he refuſes to plead the Statute, yet

Equity will not compel Executors to plead the Statute of Limitations in bar to Creditors, in favour of a Perſon who is to have the Reſidue of the Teſtator's Effects.

Equity will not, in favour of *J. S.* to whom the Surplus is deviſed, compel the Executor to plead the Statute. *Mich.* 1699, between Lord *Caſtleton* and Lord *Fanſhaw* adjudged *Bac. Eq. Ca.* 305.

Motions and Notices.

Motion what.

A Motion is the Requeſt of either Party, made *Ore tenus* to the Court, by his Counſel, or Attorney; it is a Petition, not reduced into Writing. *Moſeley's Rep.* 179.

RULE. Counſellors and Attornies to make Motions proper for themſelves, and no new Motion, to be made when a Cauſe is ſettled, unleſs it can be well ſupported.

By the 51ſt general Rule, Counſellors and Attornies are to make Motions proper for themſelves, and after a Cauſe is ſettled, (hearing Counſel on both Sides) no new Motion is to be made to croſs it; except it be upon new Matter, and unleſs they be ſure the Matter ſo alledged be weighty, and will be well proved.

On all Motions the laſt Order is to be produced.

And by the ſaid Rule, when any Motion is made, the laſt Order is always to be produced; and any Order obtained, without producing the laſt Order, to be void; and the Coſt occaſioned by the Neglect, to be paid to the Party grieved.

And

And by the ſaid Rule, all Affidavits, Certificates and Reports, are to be entered, at leaſt the Day before the Motion be made thereon.

Affidavits, Orders, and Certificates to be entered the Day before any Motion be thereon.

For the different Kinds of Motions, and in what Caſes Notice is neceſſary, and where not, ſee my *Practice of the Law Side of the* Exchequer, *Vol.* 2. 178, *&c.*

The different kinds of Motions, and where Notice is neceſſary.

In general, where Notice is neceſſary, the Motion muſt be made by Counſel; and in ſome Caſes, Counſel are to move where Notice is not requiſite, as upon Petitions for Re-hearing, Injunctions upon Attachments, Injunctions to the Party, or Attachments for Contempt, againſt the Honour or Dignity of the Court; and for Writs of *Duces tecum*, to bring Deeds or Writings into Court.

Where Notice is neceſſary, the Motion is to be made by Counſel, and in ſome Caſes where Notice is not neceſſary, Counſel muſt move.

But where Notice is not neceſſary, as in Motions of Courſe, *&c.* in ordinary Caſes, Attornies are admitted to move them: But moſt of the Motions made by Attornies, are ſuch as ought to be entered of courſe in the Office.

The Motions Attornies may make.

A Motion of Courſe, although Notice be given of it, and although it be grounded on Affidavits, cannot be oppoſed; for in ſuch Caſe, it is the Office of the Court, to examine whether ſuch

A Motion of courſe cannot be oppoſed, though grounded on Affidavit, and tho' Notice be given.

Affidavits be ſufficient, or not. *Moſeley's Rep.* 255.

Notice how to be drawn and ſerved.

When Notice is to be given, it is to be in Writing, and ſigned by the Attorney; and it muſt be ſerved upon the adverſe Party, or (which is moſt uſual) on his Attorney, and it is to be ſerved two Days before the Motion is made, that is there muſt be an intervening Day, before the Motion is made; as if the Motion is to be made on *Thurſday*, the Notice muſt be given at leaſt on *Tueſday*; but it is not good to ſerve a Notice on *Saturday*, (but on *Friday*) to move on *Monday*, *Sunday* not being reckoned a Day, in ſuch Caſes.

Notice not good, unleſs it be in Writing.

In the Caſe of *Beſt* againſt *Lecky* and others, in this Court, *Trinity* Term 1738, it was determined, that by the Rule of the Court, no Notice is good, unleſs it be in Writing.

And to be ſerved before nine o'Clock at Night.

And every Notice is regularly to be ſerved before nine o'Clock at Night, that the Attorney may have Time to ſend early Notice thereof to his Client, to enable him to prepare for his Defence; and if a Notice be ſerved after that Hour, it is never looked upon by the Court, as good Notice, or Service, if inſiſted on by the Party ſerved therewith.

This

This Rule of ſerving Notices of Motions, generally holds good in all Caſes; but as there is no general Rule, but an Exception lies to it, ſo there doth in this; for where there is a Motion for Money to be paid out of Court, the Notice muſt be ſerved perſonally, on the adverſe Party, unleſs the Defendant be out of the Kingdom, or it be difficult to find him; in which, and ſuch like Caſes, upon Affidavit thereof, and upon Motion thereon, the Court will order the Service of the Party's Houſe, or Place of Abode, or his Attorney in Court, to be good Service.

Notice to receive Money out of Court, to be ſerved perſonally.

All Notices muſt contain every Thing the Party intends to move for, for the Court will not ordinarily extend the Rule, beyond the Notice; and it is alſo to expreſs, and ſpecify, upon what Foundation the Motion is to be grounded, with the Day on which it is to be made; and is to bear Date, the Day on which it is to be ſerved.

Notices what to contain.

In the Caſe of *Archdall* againſt *Morriſſon*, in this Court, *Trinity* Term 1752, it was mentioned, in the Notice of a Motion, that the Motion would be grounded on the Pleadings and Proceedings in the Cauſe, and other Reaſons to be offered; on the Motion, the Counſel for the Party who gave the Notice offered to read an Affidavit, which had been

No Affidavit to be read on a Motion, unleſs mentioned in the Notice.

been read upon a former Motion, in the ſame Cauſe, but it was objected to by the other Side, for that no Affidavit was mentioned in the preſent Notice, and that an Affidavit did not come under the Word *Proceeding*, and it was ſo determined by the Court.

Affidavit not deemed a Proceeding in a Cauſe.

Motions may ſtand over to be heard on any other Day, where the Court thinks fit, but if Notice be given, and not moved on for two or three Motion Days after, the Party muſt give new Notice, or move to ſave his Notice, though the other Party do not diſcharge it. And if a Notice of a Motion be given twice or thrice, and not moved, the Counſel for the adverſe Party, upon producing the former Notices may pray the Court, that the Party may pay the Coſts of the former Notices, before he moves on the laſt Notice, which the Court generally orders: And if it be a Matter of Weight, and many Counſel fee'd, the Court will order Coſts to be taxed by the Officer. See *Bunbury's Rep.* 86.

Notices of Motions in what Caſes they ſhall be diſcharged, and Coſt paid.

And note, in general where a Notice is diſcharged, for not being moved on, the oppoſite Party is intitled to Coſt, whether it be, or be not mentioned in the Order.

Coſts generally to be paid on diſcharging Notices.

And

Attachment for Coſts, on ordinary Motions of Courſe.

And in all Caſes, where Coſts are to be paid on ordinary Motions, the Court will award an Attachment for the ſame, of courſe.

If a Party proceeds, pending a Notice, to ſtop Proceedings at Law, *&c.* it is at his Peril.

In the Caſe of *Guthery* and others, againſt *Cathcart*, in this Court, *Mich.* Term 1753, a Bill was filed the *January* before, for an Injunction to ſtop Proceedings at Law, after Judgment in Ejectment, and on coming in of the Anſwer, the Plaintiff ſerved a Notice to move for an Injunction on Equity confeſſed, and obtained an Order for an Injunction; but after the Notice was ſerved, and before the Motion was made, the Defendant in Equity, who was Plaintiff at Law, iſſued an *Habere facias Poſſeſſionem*, and took Poſſeſſion of the Lands thereon; but upon Application to the Court, the Poſſeſſion was ordered to be reſtored, and that the Attorney for the Plaintiff at Law, ſhould be attached; but this laſt Part of the Order was remitted, the Plaintiff's Counſel not inſiſting on it, and he was ordered to pay the Coſts. And the Court declared, that in all Caſes where a Party ſerved with Notice proceeds, pending the Notice, the Proceedings are at his Peril.

RULE.
Notices of Motions to ſet aſide Proceſs, *&c.* for irregularity, to expreſs the Irregularity.

By a Rule made in this Court, the 13th of *December* 1756, ordered, That all Notices of Motions hereafter to be made,

made, to ſet aſide any Proceſs, Orders, Decrees, or other Proceedings for Irregularity, do contain therein the Irregularity to be complained of.

Where there is an original and amended Bill, and an Applicatson is made to be relieved againſt an Order in the original Cauſe, the Notice is to be in that Cauſe.

Where there is an original and amended Bill, and new Parties, and either Party would be relieved, againſt any Order in the original Cauſe, the Notice muſt be in the amended Cauſe, for the firſt Bill is by the Amendment, out of the Queſtion. So determined in this Court, in the Caſe of *Rolls* againſt *Nagle*, 25th of *February*, 1757.

Three Years Intereſt ſworn due on a Mortgage, the Court will order the Rents into Court to be paid to the Plainitiff.

Formerly where two Years Intereſt was ſworn to be due, on any Mortgage, the Court, on Motion of Counſel, on Notice given, ordered the Rents of the mortgaged Premiſſes, to be brought into Court, to be paid to the Plaintiff, in Diſcharge of his Debt; but of late they will not do it, but where three Years Intereſt is ſworn due. This Rule of Courts of Equity, is not only in favour of Remainder Men, and Heirs, but is alſo to the Advantage of him who has the Inheritance immediately in him.

Ne

Ne exeat Regnum.

Ne exeat Regnum, what.

A *Ne exeat Regnum*, is a Writ to reſtrain a Perſon from going out of the Kingdom, without the Leave of this Court; it is called a State Writ, and as ſuch it iſſues, to reſtrain a Subject from going out of the Realm, without the King's Licence: And heretofore it is ſaid, it was to be tenderly made Uſe of, but now it is become the common Proceſs of the Court.

RULE.
In what Caſes granted.

By the 80th general Rule, where any Bill is filed in Equity, againſt any Perſon or Perſons, that have no viſible Eſtate in the Kingdom, and it ſhall appear by Affidavit, that the Defendant abſconds, and is making away his Effects, deſigning to depart the Kingdom, whereby the Plaintiff in ſuch Bill, may be in Danger to loſe his Debt, that in all ſuch Caſes, upon Application made by Petition to the Court, or any of the Barons (wherein the Subſtance of the Plaintiff's Complaint, is to be inſerted and ſworn to) and on producing a Certificate of the Bill being filed, and no Anſwer, an Order for iſſuing a Writ of *Ne Exeat Regnum* will be granted upon the Grounds aforeſaid.

In

Ibidem. In the Caſe of *Fling* againſt *Hall* and others in this Court, *Hillary Term* 1749, a Queſtion aroſe, if this Court has a Juriſdiction to grant this Writ; on the one Hand it was ſaid, that it muſt iſſue from *Chancery*, that it was formerly a State Writ, and iſſued from *Chancery* in State Affairs only, but that the Court of *Chancery* had, in Favour of the Subject, applied it in private Matters between Party and Party, as in this Court in a *Cuſtodiam* on an Outlawry, the King's Prerogative is applied to the Benefit of the Subject. But in Anſwer to this it was urged, that this Writ is neceſſary in this Court, for carrying on and tranſacting the Buſineſs of it, and as it had been always granted, when properly applied for, as appeared by ſeveral Precedents then produced to the Court, and no Inſtance appearing of its having been ever refuſed, they ſaw no Reaſon for altering the Practice, and the Writ was granted. The Precedents produced were *Stanly* againſt *Callan*, 11th *June* 1744; *Toole* againſt *Kelly* and *Ryan*, 11th *February* 1745; and *Barnet* and *Wallace* againſt *Wallace* 14th *June* 1748.

Ibidem. In *Coke*'s 2d *Inſt.* 556, it is ſaid, that a *Ne Exeat Regnum* may be by the King's Writ under the Great Seal, or by Commandment under the Privy Seal, or under the Signet; for in this Caſe, the Subject ought to take Notice as well of the Privy Seal and Signet, as of the Great

Great Seal, for this is but a Signification of the King's Commandment, and Nothing paſſeth from him. If then it iſſues under the Signet, it may well iſſue under the *Exchequer* Seal, which is of much greater Weight than the Signet. See alſo *Fitz. Natur. Brev. fo.* 85.

In the Caſe of *M'Cormuck* againſt *M'Clurcan* in this Court in *Eaſter Term* 1728, a *Ne Exeat Regnum* was granted, upon an Affidavit that the Defendant threatned to leave this Kingdom. Ibidem.

And this Writ is commonly directed to the Sheriff, to cauſe the Defendant to come before him, and give ſufficient Security that he will not depart the Realm without the Leave of the Court; and on his Refuſal to give ſuch Bail, or Surety to the Sheriff, he is to commit him to the next Priſon; and the Sheriff is to make and Return a Certificate of ſuch Security to the Court. To be directed to the Sheriff, and his Duty thereon.

The Court do uſually name the Sum for which the Bond for yielding Obedience to the Writ ſhall be, and it is to be inſerted in the Body of the Order, and alſo in the Body of the Writ; and generally the Penalty is double ſuch Sum. The Security to be given by the Defendant.

It was formerly thought, that upon the Party's putting in a full Anſwer, the Writ ſhould be diſcharged, but of late the Security to be entered into by Recognizance in the Court.

the Party hath been obliged to give Security to abide the Order on Hearing, before the Court will diſcharge the Writ; which Security is taken by Recognizance before the Lord Chief Baron, as all other Securities are, and is in the Penalty of what is ſworn due.

How the Defendant is to get himſelf diſcharged.

But if the Defendant can ſatisfy the Court by Anſwer, or otherwiſe, that he hath no Deſign of leaving the Kingdom, nor is indebted to the Plaintiff, then he may give Notice, and move the Court by Counſel that the *Ne Exeat Regnum* may be diſcharged; and upon hearing Counſel on both Sides, the Court will either diſcharge, or continue it, as they ſee Reaſon.

It is an Abuſe of this Proceſs to break open Doors, yet the Court won't ſet the Party at Liberty.

Note, it hath been held an Abuſe of this Proceſs to break open Doors, and to take the Party in Bed; but yet the Court for this Cauſe would not order him to be ſet at Liberty. See *Pract. Reg.* in *Chan.* 250, 251, 252.

A *Ne Exeat Regnum* granted, tho' no Bill in Court.

A Solicitor's Bill being taxed, and reported overpaid ſixty Pounds, the Client, on Motion and Affidavit of his being about to go beyond Sea, had a *Ne Exeat Regnum*, tho' there was no Bill in Court whereon to ground this Writ. *Preced* in *Chanc.* 171. That this Writ is grantable at the Suit of a private Perſon, and lies for a private Matter without a Bill,

a Bill. *vide* 1 *Ch. Ca.* 116. 2 *Ch. Rep.* 19. *Fitz Nat. Brev.* 85.

A Surety in a *Ne exeat Regnum* was refuſed to be diſcharged, after the Defendant had anſwered, even after a Decree againſt the Defendant, and Commitment for 19,000 l. decreed againſt him; for if (as it was urged) there was no Danger of the Defendant's going beyond Sea, (being in Priſon) then the Surety was in no Danger. *Chanc. Prec.* 230.

A Security in a *Ne exeat Regnum* refuſed to be diſcharged, tho' Defendant was in Priſon for 19,000 *l.* decreed againſt him.

Orders.

IT is not intended under this Head, to treat of the general and ſtanding Orders of the Court; nor of ſuch Orders as are made on Hearings, called decretal Orders; but the Orders here intended are chiefly interlocutory Orders, which are, all Orders made in the Cauſe antecedent to the definitive Sentence. See *Title Bill of Review.*

And here it is to be obſerved, that there are many Occaſions intervening in a Cauſe which require Motions or Petitions to ſet them right; now ſuch Directions as are given by the Court on ſuch Motions or Petitions are commonly called interlocutory Orders; and thoſe

Interlocutory Orders what.

Orders are of ſeveral Kinds, and are either of courſe, or ſpecial: Sometimes they relate to the proſecuting or carrying on of a Cauſe, and ſometimes they are touching Proceſs, *&c.* At other Times, they are founded on the ſtanding Rules of the Court, and upon the particular Circumſtances of the Caſe, and are made upon the Application of ſome Perſon either Plaintiff or Defendant intereſted in, or affected by the Cauſe. When they are made upon hearing Counſel on both Sides, Regard is always had to the general Rules of the Court; but when they are made by Conſent of Parties, they are often out of the general Rules, or Courſe of the Court; in which Caſes, the ſpecial Reaſons moving the Court to vary from thoſe Rules, are always expreſſed in ſuch Order.

Orders by Conſent often out of the general Rules or courſe of the Court, but not otherwiſe.

Of drawing up ſpecial Orders.

All Orders muſt be pronounced in Court, and drawn up by the Regiſter from his Minutes taken in Court; of which Minutes the Attorney in Court, or Agent of each Side may have a Copy in Order to be informed of any thing that is ſpecial therein. And if in ſpecial Caſes any Difficulty or Doubt ariſes in the Minutes, the Parties may attend the Regiſter about explaining them; and if by this Means they cannot be ſettled to the Satisfaction of the Parties, the Court may be applied to by Counſel to explain or amend them. And the Court will

Copies of the Minutes may be taken by each Party, and if any Difficulty or Doubt ariſes in the Minutes of any ſpecial Order, the Court will rectify it.

will order the Regiſter and all Parties to attend by their Counſel thereon; and the Court will then make ſuch Order about rectifying the Minutes as they ſhall ſee Cauſe.

Orders of Courſe.

But with reſpect to Orders of Courſe, or ſuch Orders as are not in ſpecial Caſes, there is no Occaſion to take a Copy of the Minutes, *&c.*

Of drawing up paſſing, entring and ſerving Orders.

When an Order is to be drawn up, the Attorney for the Party who is to have it, is to leave with the Regiſter the Notice, laſt Order (if any) and the Brief, or other proper Inſtructions; and from theſe, and his Minutes, he draws the Order; and when it is properly ſettled, it is to be atteſted by the Chief Remembrancer or his Deputy, and then to be entered in the Book of Orders, after which and not before, regularly, it may be ſerved on the other Side; for all Orders muſt be paſſed and entered before allowed or ſerved. And if either Party expects any Uſe or Benefit by an Order, it muſt be firſt drawn up, paſſed, and entered in this Manner.

The Regiſter to read over in Court all ſpecial Orders after they are pronounced.

The Regiſter is to take down all Minutes truly; and in ſpecial Caſes, and upon Hearings, they are uſually, ſo ſoon as pronunced, read over by him in Court: And if any Order be drawn up contrary to the Directions of the

Court, (which very rarely happens) they will, upon Motion as aforeſaid, appoint a Day for both Sides to attend with the Officer to ſet it right.

RULE. *Pars*, the laſt Order to be produced on every Motion.

By the 51ſt Rule, *Pars*, when any Motion is made, the laſt Order is always to be produced, and any Order obtained without producing the laſt Order to be void, and the Coſts occaſioned by the Neglect to be paid to the Party grieved.

And in drawing up of Orders, the laſt Order is generally recited.

The Officer in drawing up ſuch Orders, always mentions the next precedent Order, in which great Care ought to be taken that it be fully and truly recited, leſt a Miſtake therein ſhould vitiate the Order.

Orders may be altered or diſcharged on good Cauſe.

After Orders are entered, they may not only be altered, but even diſcharged on good Cauſe, by ſpecial Direction of the Court; and when a Party moves to diſcharge an Order, he muſt have it drawn up ready to be produced to the Court.

Of making Orders *Niſi*, abſolute.

A Motion to make an Order *Niſi*, abſolute, is not to be made until after the Day given to ſhew Cauſe; and upon this Motion, an Affidavit muſt be produced of the Service of the Order, and a Certificate from the Officer of no Cauſe being ſhewn to the contrary, and then,

then, if upon the Motion no Cauſe is ſhewn, the Court makes it abſolute.

The uſual Way of ſerving an Order (except where perſonal Service is requiſite, or directed by the Court) is by giving a Copy thereof to the Attorney for the oppoſite Party any where, at the ſame Time ſhewing him the original Order atteſted as aforeſaid, or it may be ſerved by delivering a true Copy thereof to his Clerk at his Office; or to his Wife, or his Servant, or Child, above the Age of ſixteen Years, at his dwelling Houſe or Place of Abode. The Method to be obſerved in ſerving Orders.

As to Contempts for Diſobedience of an Order, the Party muſt generally be ſerved with the Order, before it can be deemed a Contempt for not obeying it: But if the Party was actually preſent in Court when the Order was pronounced, or if he be a Servant or Miniſter of the Court, upon whom the Order is made, as an Attorney, *&c*, it may be otherwiſe; becauſe he is ſuppoſed to be preſent, and to know what paſſed in Court. And if the Fault be againſt a ſtanding Order of the Court, there needs no Notice of it. *Pract. Reg.* 102. But it is the better Way to ſerve the Order. In what Caſes they may or may not be ſerved.

By the Statute 10th *William* 3d. *Seſs.* 2d. 6th. 14th. a Submiſſion to an Award may be made an Order of this Court, A Submiſſion to an Award may be made an Order of Court.

on producing to the Court an Affidavit of the Perfection thereof.

The Office Fees for conditional and abſolute Orders.

For every Order, unleſs Cauſe, the Fee to the Office is 2s. 6d. and for every abſolute Order 3s. 6d. unleſs it be long; if it be it is computed by the Sheet, and for every Sheet the Officer has ſix Pence.

No Order on an Affidavit to be ſigned till Affidavit be filed.

The Officer is not to draw up, or ſign any Order grounded upon an Affidavit, unleſs it be firſt filed.

An Attorney may aſſent to an interlocutory Order, but not to a Reference finally to determine.

An Attorney's Aſſent to an interlocutory Order may bind, but not to a Reference finally to determine. 1 *Ch. Ca.* 87.

A Perſon may be brought into Court to anſwer on Interrogatories touching the Breach of an Order within a Year, but after the Breach to be ſet forth by Bill.

If one is brought into Court to anſwer the Breach of an Order, if within the Year, he ſhall anſwer upon Interrogatories without a Bill: But if after the Year a Bill ought to be filed to ſet forth the Breach. *Danv.* 776. 1 *Har. Ch. Pract.* 3d. *Edit.* 188.

A Miſtake in the Title of an Order amended, tho' againſt a Surety.

The Court gave Leave to rectify a Miſtake in the Title of an Order, tho' againſt a Surety that gave a Recognizance to abide the Order of Hearing. 2. *Vern.* 376.

If one Party obtains an Order, the other may uſe it of courſe.

Where one Party obtains an Order, the other Party may uſe the ſame without

out Motion. 2 *Har. Ch. Pract* 441, 2d. *Edit.*

Orders are often made by the Court on the Agreements or Conſent of the Parties, or their Attornies in Court; but the Court generally aſks what they are for, or whether there be any Infant or *Feme Covert* in the Caſe, for if there be, the Court cannot make the Agreement or Conſent of the Parties an Order of the Court, becauſe no Infant or *Feme Covert* can be bound thereby.

Orders on Conſent or Agreement of the Parties or Attornies, not binding on Infant or *Feme Covert.*

Where by an Order of this Court a Party is to ſhew Cauſe why an Attachment or other Matters ſhould not be awarded againſt him, and that ſuch Order has been irregularly or ſurreptitiouſly obtained; in ſuch Caſe, he is to apply by Counſel to ſet aſide the Order, and not to ſhew Cauſe againſt it, for the Court will not knowingly ſuffer an improper Order to ſtand: But if the Party comes to ſhew Cauſe, he admits the Regularity of the Order, and muſt be determined by the Merits of the Caſe.

Moving to ſhew Cauſe againſt an Order irregularly obtained, the Regularity is admitted; the Motion muſt be to ſet it aſide.

In the Caſe of *Thomas* againſt *Place*, in this Court, *Michaelmas Term*, 1755, there being ſeveral Defendants to the Bill, and a Commiſſion of Rebellion having iſſued againſt ſome of the Defendants, who were in Contempt for not anſwering; a Motion was made to ſet aſide the Commiſſion of Rebellion, for that there was no

Orders how to be drawn up, where there are ſeveral Defendants and eſpecially on iſſuing Proceſs of Contempt againſt ſome of the Defendants only.

no Order to ſupport it, the Parties in Contempt being only made Parties to the Order, ſo that it was not an Order in the Cauſe; and for this Reaſon, the Commiſſion of Rebellion was ſet aſide, altho' it appeared, that the Officer who enters the Rules, only makes thoſe Defendants in the Rule, againſt whom the Proceſs iſſues, and that the Proceſs can only iſſue againſt thoſe, and that the Parties to the Cauſe are not ſet forth in the Attachment, and that this was the conſtant Courſe: But the Court ſaid, that this was an improper Way of entering the Rule, that in the Title of the Cauſe, it ought to be againſt the Parties in Contempt, and others; but in the Body of the Rule, the Proceſs ſhould be only ordered againſt the Perſons in Contempt.

Of Leading Orders.

Leading Order what.

WHEN the Court, upon the Hearing, doubts of ſome intervening Fact material in the Cauſe, which often happens, when the Proofs relating to ſuch Fact are oppoſite and contradictory, or uncertain; or where a Plaintiff goes into a Court of Equity for Damages which are uncertain, and not to be ſettled but by a Jury, and the Defendant anſwers and

and conteſts without demurring; in ſuch and the like Caſes, the Court will direct an Iſſue at Law to try the Fact, or the *Quantum* of the Damages as the Caſe is, and this is called a leading Order. *Quantum Damnificatus.*

And by this leading Order in this Court, the Plaintiff is ordered to commence forthwith a feigned Action in the Pleas Side of this Court, and that the Defendant do forthwith appear thereto, and plead the general Iſſue, and admit of all Matters of form, ſo that a Trial may be had, by a Jury of the City or County, where the Court ſhall direct the Trial to be, on the Iſſue expreſſed in the Order: And the Sheriff of the County or City, where the Trial is to be, is ordered to return the grand Pannel of the Freeholders to the Chief Remembrancer of this Court, who is deſired to ſtrike a Jury thereout for the Trial of the Iſſue; and either Party are to be at Liberty to read and give in Evidence on the Trial, the Depoſition or Depoſitions of ſuch Witneſs or Witneſſes who by reaſon of Death, or any other lawful Cauſe, to be made appear by Affidavit, cannot attend the Trial. And if a ſufficient Number of the Jurors ſhall not attend the Trial, the Judge before whom the Trial is to be had, is by the Order deſired, at the Requeſt of either Party, to grant a *Tales*, and alſo to Proceedings thereon.

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to certify ſuch Verdict as ſhall be given on the Trial.

Ibidem. And when this Order is made out, it is to be ſerved on the oppoſite Party, and ſettled and ſigned in the ſame manner as other interlocutory or decretal Orders are. See *Title Decrees, &c.* And when it is ſigned by Counſel, and Attornies on both Sides, and by the Chief Remembrancer; it is to be brought to the Clerk of the Pleas Office of this Court, to be entered by him; in a Book which is kept for that Purpoſe in his Office; and when it is entered there, he is alſo to atteſt it, for which you pay 1 s. 6 d. Fees: And it is afterwards to be ſigned by the Chief Baron, whoſe Fee is 6 s. 8 d.

Ibidem. When the leading Order is brought to the Clerk of the Pleas Office as aforeſaid, if the Defendant has appeared, the Plaintiff's Attorney may at the ſame Time file his Declaration [at the Foot of which he is to write, that it is upon a leading Order, that no Rules to plead may be entered thereon, for, by the Order, the Defendant is to plead to Iſſue]. And let him give the Defendant's Attorney Notice that the Declaration is filed, and requeſt him to file his Plea forthwith; and when the Plea is filed, he may get a ſhort Order drawn up in the Chief Remembrancer's Office for the Sheriff

Sheriff to return the grand Panel or Book of Freeholders, to the Chief Remembrancer, who in preſence of Attornies on both Sides, is to take thereout the Names of Forty-eight Perſons, from which each Attorney ſhall ſtrike out Twelve, and the remaining Twenty-four ſhall be certified by the Chief Remembrancer as the Jury to be impannelled by the Sheriff to try the Iſſue: But the Sheriff generally returns the grand Panel without requiring to be ſerved with ſuch particular Order, and the Record is then to be made up and tried as in Caſe of a ſpecial Jury at Common Law.

If the Attorney for either Party ſhall neglect to attend the Officer, he may after Service of one Summons proceed *ex Parte*, and ſtrike twelve for the Attorney, who makes Default. *Quær.* Ibidem.

When the Trial is over, the Party in whoſe Favour the Verdict is, may get a Certificate thereof from the Judge who tried the Cauſe, and upon Motion of his Attorney thereon in the Equity Side of this Court, an Order is made to confirm the ſame, unleſs Cauſe; and if no Cauſe be ſhewn to the contrary in four Days after Service of ſuch Order, then the Attorney may, on producing the Order, an Affidavit of the Service thereof, and a Certificate from the Chief Remembrancer of no Cauſe being ſhewn, have the Ibidem.

the laſt Order made abſolute, and may at the ſame Time, upon Motion, obtain another Order that the Cauſe may be ſet down to be heard on the Certificate of the Verdict and the Merits, which laſt Order is to be ſerved upon the oppoſite Attorney four Days before the Day appointed for the Hearing, excluſive of the Day on which it is ſerved.

Ibidem. And upon the Hearing, the Plaintiff is to produce the Order for Hearing, an Affidavit of the Service thereof, the Certificate of the Verdict, and the abſolute Order for confirming it: But the Plaintiff need not in this Caſe ſerve a *Subpœna* to hear Judgment.

How to proceed in Caſe the Defendant ſhall neglect or refuſe to appear and plead in Time, ſo that a Trial, cannot be had purſuant to the Order. If the Defendant neglects or refuſes to appear, or plead in Time, ſo that a Trial cannot be had purſuant to the Order, in ſuch Caſe the Plaintiff may apply to the Court to have the Order renewed, and another Day appointed for Trial, and that the Defendant may in a ſhort Day enter an Appearance in the Pleas Side of this Court, and may alſo plead in a ſhort Day after the Plaintiff hath filed his Declaration, or that the Iſſue may be taken as if found againſt the Defendant, and the Court will make an Order for this Purpoſe: And if the Defendant ſhall in either Caſe again make Default, upon Certificate thereof, and upon Affidavit of the Service of this laſt

laſt Order, and upon Motion of Counſel thereon (without Notice,) the Court will make the Order abſolute, and will proceed in the Cauſe as if the Iſſue had been found againſt the Defendant: And Note, it is ſaid, that it has been ſometimes practiſed to apply for this Order, at the ſame Time that the Iſſue is directed, eſpecially where the Plaintiff has Reaſon to apprehend that the Defendant is inclined to give Delay, and that it has been granted.

And how if the Plaintiff delays.

So, if the Plaintiff after the Defendant has appeared, does not file his Declaration in Time, the Court on, Motion of the Defendant's Counſel, on Notice duly ſerved, and on a Certificate of the Defendant's Appearance, will compel the Plaintiff to file his Declaration in a reaſonable Time, ſo that the Iſſue may be taken as found againſt him. See *Archdalla* gainſt *Morriſon*, *Trinity* 1752. The like in the ſame Caſe, *Trinity* 1754.

Ibidem.

And if the Declaration be not filed in the Time preſcribed by the Order, the Court, on Motion of Counſel (without Notice) on an Affidavit of the Service of the Order, and a Certificate of no Declaration filed, will proceed as if the Iſſue had been found againſt the Plaintiff, and make ſuch Order in the Cauſe as ſhall ſeem meet.

If

The Court of *Chancery* will give Coſts for not going to Trial on an Iſſue directed.

If an Iſſue be directed out of *Chancery* to be tried, and the Party Plaintiff in the Iſſue gives Notice of Trial, and does not countermand it in Time, upon Motion, the Court of *Chancery* will give Coſts, and not put the Defendant to move the Court of Law, where the Iſſue is to be tried. 2 *Williams*, 68.

Court of Chancery to be moved for a ſpecial Jury, where an Iſſue is directed, if requiſite.

So on an Iſſue being directed out of the Court of *Chancery*, after ſuch Iſſue made up, it is proper to move the Court of *Chancery* for a ſpecial Jury, if the Circumſtances of the Caſe require it, and the Court will grant the ſame; as they did in the Caſe of the *Attorney General* and *Snow*. 2 *Williams*, *Rep.* 27.

Coſts at Law and in this Court allowed.

When by an Order of this Court, Proceedings are had at Law to try the Iſſue, or the like, the Party ſhall have his Coſts at Law allowed, as well as his Coſts in this Court.

Where the Court can determine the Matter, it ſhall not be an Handmaid to other Courts.

But when this Court can determine the Matter, it ſhall not be an Handmaid to other Courts, nor beget a Suit to be ended elſewhere: And, therefore, where a Trial at Law was preſſed for, whether there was a new Publication or not, it was ſaid, the Cauſe muſt properly end here; and where the Court has a Juriſdiction as to the End, it muſt have likewiſe as to the Means: And if the Court is

is fully ſatisfied as to the Evidence, they will not ſend it to a Trial at Law. *Treat. of Equ.* 131.

For an Iſſue at Law (as has been ſaid before) is a feigned Iſſue in an Action upon the Caſe, directed by the *Chancery* for the better informing and guiding the Conſcience of the Court: And, therefore, no Iſſue ought to be directed to try a Matter fully proved in the Cauſe. *Ibidem.*

Of the Nature of an Iſſue at Law, and where to be directed.

So, where the Proof of Deeds is very plain, it would be dangerous to direct an Iſſue to try the Reality of them; neither is it proper to direct an Iſſue, whether there be a Truſt or not, eſpecially where a Truſt appears by Implication from the Nature of the Caſe. *Ibidem*, and 132.

Ibidem.

Seldom granted to try whether there be a Truſt or not.

And regularly an Iſſue ought not to be directed, to try a Title not alledged in the Plaintiff's Bill: Yet, if upon the Hearing, a Matter not in Iſſue does appear to the Court, which goes to the very Right, the Court will ſometimes order an Iſſue at Law to try it, and decree thereupon. *Ibidem.*

In what Caſes an Iſſue ſhould or ſhould not be directed.

And Iſſues are frequently directed where Matters of Law are mixed with Matters of Fact; becauſe the Judges can explain to the Jury, what the Law would be

Where Matters of Fact and Matters of Law are mixed

be if they ſhould find the Facts. *Ibidem.*

When an Order may be obtained for a new Trial.

Although in all Iſſues, directed by the Court of *Chancery*, either Party may apply for Leave, and obtain an Order for a new Trial; yet this ſeldom comes to any Thing, unleſs the Judge, before whom the Cauſe was tried, certifies his Diſſatisfaction of the Verdict, or that it is fit to undergo another Trial; there the Party ſhall have another Trial, upon Payment of the Coſts of the former Trial.

Rule in Equity, that an Heir ſhall not be bound down by one ſingle Trial.

But ſtill it is taken as a fundamental Rule in Equity, that the Inheritance of an Heir at Law ſhall not be bound down by one ſingle Trial: He may have another Trial for aſking for; but if the ſecond Verdict goes againſt him, he will not be intitled to a third Trial for aſking for. And where Verdicts have gone ſeveral Ways, it has always been the Wiſdom and Policy of the Court, to decree according to the Majority of theſe Verdicts, or elſe there never would be an End of the Matter in Queſtion: And perhaps it may be better to deny another Trial, than to have the Parties in an eternal Diſpute.

Com-

Commiſſions of Partition, to aſcertain the Bounds of any Lands, adjoining to any Bog, Moſs, or Lough, &c. on the Statute 5 Geo. 2d. Ch. 9.

WHEREAS there are great Tracts of unprofitable Bog, and low Grounds, over-flown by Rivers, Loughs, or the Sea, which might be taken in, drained, and improved, if the Property thereof was ſettled, and due Encouragement given thereto.

Unprofitable Land, where the Property is unſettled, may be aſcertained.

It is enacted, by the Statute 5th *Geo.* 2d. Ch. 9, where any Perſon ſhall be ſeized or poſſeſſed of any Lands, adjoining to any Bog, Moſs, or Lough, or to Ground between the Flux and Reflux of the Sea, and ſhall be deſirous to aſcertain the Bounds thereof with the Proprietors of the other Lands adjoining to, or on the other Sides of the ſame, ſuch Perſon may exhibit an *Engliſh* Petition in the Court of *Chancery*, or *Exchequer*, againſt the Proprietors of the other Part of ſuch Bog, *&c.* or of the Lands thereto adjacent, deſiring ſuch Bounds to be aſcertained; and upon Proof made by Affidavit of ſuch Proprietors, and the Tenant

An *Engliſh* Petition to be exhibited.

And to be ſerved on all the Perſons concerned: And on Affidavit thereof, a Commiſſion to iſſue to examine Witneſſes.

in Poſſeſſion, being perſonally ſerved with Copies of ſuch Petition, at leaſt thirty Days before the Time appointed for hearing thereof, the Court may iſſue a Commiſſion to ſeven or more Commiſſioners; for which Commiſſion the ſame Fees ſhall be paid, as for a Commiſſion to examine Witneſſes, requiring ſuch Commiſſioners, or any five or more of them, by Examination of Witneſſes upon Oath (to be adminiſtred by them) and by the Verdict of twelve Men, to be returned, on the Precept of ſuch Commiſſioners, by the Sheriff of the County where the Lands lie; or if they lie in two Counties, then one equal Moiety of ſuch Jury to be returned out of each of the Counties, by the ſeveral Sheriffs thereof, to enquire and aſcertain the old Bounds of ſuch Bog, *&c.* if there be any ſuch; but if no ſuch, then to make and aſcertain ſuch reaſonable Bounds between the Petitioners and the other Proprietors in the Petition, having Regard to the Length of the profitable Land adjoining to ſuch Bog, *&c.* belonging to ſuch ſeveral Proprietors, as to them, or the major Part of them, ſhall ſeem reaſonable.

Fees of the Commiſſion.

The Commiſſioners, *&c.* may lay out and aſcertain Drains.

Where a Drain is neceſſary to carry off the Water from ſuch Bog, *&c.* the ſaid Commiſſioners, *&c.* ſhall lay out and aſcertain the ſame, and the Length, Breadth, and Depth thereof, and order what

what Proportion thereof ſhall be made by the ſaid ſeveral Proprietors, with Regard to the Benefit that each of them may receive thereby; and the ſaid Commiſſioners, *&c.* ſhall return, under their Hands and Seals, into the Court out of which ſuch Commiſſion iſſued, what they have done by Virtue thereof; whereupon the Court may make ſuch Orders for confirming, altering, or amending ſuch Return, or may ſet aſide the ſame, and iſſue a new Commiſſion, as the Court ſhall think reaſonable.

The Commiſſioners to make a Return to the Court, of what they have done.

And the Court may make Orders thereon, as they ſhall ſee fit.

If no Complaint be made to the Court againſt ſuch Return, within thirty Days next after filing thereof, if it be filed in Term-time, or in the next Term after the filing, if filed in the Vacation, from thenceforth ſuch Return ſhall ſtand and be confirmed; and ſuch Return, ſo confirmed, *&c.* and any Order thereupon made, ſhall bind all Parties to the ſaid Proceedings, and all Perſons claiming or deriving any Eſtate, *&c.* in or to the ſaid Lands, or any Part thereof, by, from, or under them, or either of them.

The Time for complaining againſt ſuch Return.

And when confirmed, to be binding to all Parties concerned, *&c.*

Provided no leſs than twenty-four Men be returned, out of which ſuch Jury may be taken, to whom Challenges may be taken by the ſaid Parties, as on Trials in Actions at Law.

No leſs than twenty-four to be returned, for the Jury to be taken thereout, and Challenges may be taken.

The Remedy againſt any Proprietor refuſing to make his Proportion of the Drain.

If any of the ſaid Proprietors, after three Months Notice in Writing given to them, ſhall neglect or refuſe to make his Proportion of ſuch Drain, according to ſuch Order, then the other Proprietors may make ſuch Drain, and ſue ſuch Proprietor, neglecting, by Civil Bill, at the Aſſizes for the County in which ſuch Drain, or any Part thereof, lieth, or at the Quarter-Seſſions, if in the County of *Dublin*, for the Sum his Proportion amounts to.

What each Proprietor is to pay.

Provided no one Proprietor ſhall pay more than one Shilling and Six-pence for each Perch, containing twenty-one Feet in Length, or more than Ten Pounds in the whole, towards making ſuch Drain, in any one Year.

The Allowances to be made to Tenants for Life, or Years, *&c.* their Executors, Adminiſtrators, or Aſſigns, for their Expence of ſuch Drain.

And may hold ſuch Bog, *&c.* after the Eſtate or Term, until ſatisfied thereout.

If any ſuch Proprietors, who ſhall make ſuch Drain, or againſt whom any ſuch Sum of Money ſhall be recovered, as aforeſaid, are only Tenants for Life or Years, ſuch Tenants, after the Determination of their Eſtates, their Executors, Adminiſtrators, and Aſſigns, ſhall hold ſuch Bogs, *&c.* until out of the Rents, *&c.* thereof, they are paid the Sums following, *viz.* if ſuch Proprietor, at the Time of filing the ſaid Return, be poſſeſſed of a Term leſs than ſeven Years, then until he be paid ſuch Sums as he hath expended, or have been recovered againſt him as aforeſaid: But if at ſuch Time

Time he hath ſeven Years, then until he receive three Parts in four of ſuch Sums; but if he be then a Tenant for one Life, or by the Courteſy, or in Dower, or have fourteen Years, then until he or ſhe receive two Parts in three of ſuch Sums; but if he have then two Lives, or twenty-one Years, then until he be paid one fourth Part of ſuch Sums; but if he hath then a Term of three Lives, or thirty-one Years, or any greater or longer Eſtate or Term, he ſhall have no Allowance for ſuch Drain, when ſuch Eſtate or Term is determined.

The Proceedings to obtain the Commiſſion.

The Petition is to be drawn up and ſigned by Counſel and Attorney, and to be filed in the Chief Remembrancer's Office, and then a Motion is to be made to the Court by Counſel, on an atteſted Copy thereof, and thereupon the Court will appoint a Day, and will order the ſeveral Proprietors, or Perſons mentioned in the Petition, to anſwer the Matter thereof in thirty Days after Service of the ſaid Order; and the Petition is to be ſet forth at large in the Order; and when it has been ſerved in ſuch Manner as is directed by the Statute, if none of the Parties ſerved ſhall anſwer the ſame, on Affidavit of ſuch Service, and a Certificate of no Anſwer being filed; and on Counſel's Motion, and proper Notice given, the Court will order the Defendant to return Commiſſioners Names in

a Week after Service of the Order, (and if there be ſeveral Defendants, that they ſhall join in returning them) or the Officer to ſettle them, and a Commiſſion to iſſue for that Purpoſe.

A Day to be appointed for hearing the Commiſſion, before it is ſerved.

It was determined in the Court of *Chancery*, in the Caſe of *Richardſon* againſt *Browne* and others, that a Day muſt be appointed for hearing the Petition before it is ſerved. 27th *July*, 1749.

The Proceeding on the Commiſſion.

Then, when the Commiſſion has iſſued, the Commiſſioners iſſue a Precept, under their Hands and Seals, directed to the Sheriff of the County where the Lands, *&c.* lie, requiring and commanding him to ſummon and give Notice to a ſufficient Number of Freeholders of the County, to enquire and aſcertain the Mears and Bounds, and to return the ſame.

Ibidem.

And the Sheriff, on this Precept, is to return a Jury of twenty-four good and lawful Men of the County, out of which the Commiſſioners are to ſwear twelve, who are to perambulate the Ground, *&c.* of which the Bounds are to be aſcertained; and to hear the Evidence of all ſuch Witneſſes, as ſhall be produced on the Behalf of either Party; and the Verdict to be given by the ſaid Jury under their Hands and Seals is to be annexed

nexed to the Commiſſion, and the Commiſſioners are to certify the ſame, and their Proceedings, under their Hands and Seals.

And the Commiſſion and Verdict, or Inquiſition annexed thereto, is to be returned, with the Precept and Certificate, to the Court; and then a Motion is to be made thereon, by Counſel, to receive the Partition purſuant to the Statute, and to confirm it, unleſs Cauſe, which the Court will order; and all Parties concerned in Intereſt are to be ſerved with this Order: And if no Cauſe be ſhewn againſt confirming the Partition, in four Days after ſervice of the Order, the Court, on Affidavit of the Service of the Order, and Certificate of no Cauſe ſhewn, will, on Counſel's Motion, confirm the Order. See *Ogle* againſt the *Biſhop* of *Dromore*, in this Court, in 1737 and 1738. Ibidem.

If the Parties, ſerved with the Petition as aforeſaid, or any of them, ſhall anſwer and conteſt it, the Court will hear it as a Cauſe before the Commiſſion iſſues, and will make ſuch Order therein, as from the Circumſtances of the Caſe ſhall ſeem fit and convenient. If the Petition be anſwered, it is heard as a Cauſe.

The FORM of the PETITION.

The Form of the Petition.

To the Right Honourable the Chancellor, Treaſurer, Lord Chief Baron, &c.

THE Humble Petition of , of , in the County of Eſq;

Sheweth,

THAT by an Act of Parliament made in this Kingdom, in the Fifth Year of the Reign of his preſent Majeſty, Intitled, "An Act to encourage the Improve-"ment of barren and waſte Lands, and "Bogs, and planting of Timber Trees," and ſo forth; it is, among other Things, Enacted, *&c.* (then recite the Purview of the Statute) as by the ſaid Act may appear.

That your Petitioner being ſeized in Fee of the Lands of, *&c.* ſituate, lying, and being in the Lordſhip of in the County of and there being a large Moſs or Bog, known by the Name of Bog, which Bog is alſo a Part and Parcel of, *&c.* on, *&c.* [here ſet forth the ſeveral Lands which ſurround the Bog, *&c.* and of which it is Part and Parcel, with the Names of the ſeveral Perſons whoſe Eſtates of Inheritance, ſuch Lands, *&c.* are] ſituate, lying, and being in the ſaid County of a great Part of which

which ſaid Bog hath Time immemorial been in the Poſſeſſion of your Petitioner and his Anceſtors, and his and their under Tenants, and the other Part thereof, in the Seizin and Poſſeſſion for many Years laſt paſt of the ſaid and their ſeveral under Tenants.

That there had been formerly an antient Marſh, Mearing, or Drain cut thro' the ſaid Moſs or Bog, in order to preſerve the ſeveral Proprietors of the ſaid ſeveral Lands contiguous to the ſaid Bog, their ſeveral and reſpective Properties and Poſſeſſions therein diſtinct from each other, which was accordingly held and enjoyed in Severalty according to the ſaid antient Mears and Bounds, until lately, the ſaid Drain or Mearing being ſuffered to grow up, the Tenants of the ſaid and have greatly incroached upon your Petitioner and his Tenants, their Part of the ſaid Bog or Moſs, and have forcibly taken Poſſeſſion of a conſiderable Part thereof.

That your Petitioner had cauſed frequent Application to be made to the ſaid and to have the Mears and Bounds of the ſaid Moſs and Bog examined into and aſcertained, whilſt ſeveral of the ſaid Inhabitants of the ſaid Lands are living, and who only can prove the Mears and Bounds thereof, and who are now very antient and infirm, all which the

the ſaid and have declined hitherto to do.

May it therefore pleaſe your Lordſhips to order a Commiſſion to iſſue to proper Commiſſioners, directed to Enquire into and aſcertain the antient Mears and Bounds of the ſaid Moſs or Bog; and if no ſuch antient Mears or Bounds ſhall appear, then in that Caſe to make and aſcertain ſuch reaſonable Mears and Bounds between your Petitioners ſaid Eſtate and Lands, and thoſe the Lands and Eſtate of the ſaid and as to the ſaid Commiſſioners ſhall ſeem meet, purſuant to the ſaid before recited Act of Parliament.

And your Petitioner will Pray.

N. B. If the Petition be to make and aſcertain Bounds where no old Bounds have been to ſuch Moſs, Bog, *&c.* in ſuch Caſe, the Petitioner muſt ſet forth in his Petition how far the profitable Land of his Eſtate or Farm extends, by the Edge of the ſaid Bog, *&c.* and the Remainder of his Petition is to be framed accordingly.

The

The Form of the Precept.

County of To wit.

A. B. Plaintiff
H. Ld. *B.* of
D. R. H. M.
L. S. W.
Eſqrs. Defts.

WHEREAS a Commiſſion of Partition hath iſſued out of the *Chancery* Side of his Majeſty's Court of *Exchequer* in *Ireland*, and under the Seal thereof in this Cauſe directed to us, *V. J. M. W. J. B. P. M. T. S. J. S. T. W. L. S. C.* Eſqrs. as Commiſſioners appointed in and by the ſaid Commiſſion to aſcertain the Mears and Bounds of the Bog and Moſs, called the near, *&c.* in this County, which ſaid Commiſſion bears Teſt the Day of and is returnable into the ſaid Court of *Exchequer* in next coming.

We therefore by Force of, and in Obedience to the ſaid Commiſſion, do iſſue this our Precept, and thereby Charge and require you to ſummons, and due Notice give to a ſufficient Number of Freeholders, good and lawful Men of the ſaid County of *D.* to be on the Day of next in the Forenoon, at, *&c.* to be of the Jury, to enquire of, and aſcertain the old Mears and Bounds of the ſaid Bog or Moſs, if any ſuch there be, and if none appear to them, then to lay out and aſcertain ſuch reaſonable Mears

Mears and Bounds between the Plaintiff and Defendants, with regard to the Length of the profitable Lands adjoining thereto, as to the ſaid Commiſſioners, or the major Part of them, ſhall ſeem reaſonable, where you are to have the Names of the ſaid Jury, and the due Return of this Precept: Given under our Hands and Seals this Day of

To E. T. *Eſq; High Sheriff of the ſaid County of* D.

V. J.
M. W.
T. W.
J. S.
P. M.

The Charge upon the Enquiry and Verdict.

County of *D.* To wit.

The Names of the Jury Sworn, purſuant to the within Precept.

A. B. Plaintiff.	1	*H. C.*	7	*J. K.*	
	2	*J. W.*	8	*E. H.*	
B. of *D. R.*	3	*J. P.*	9	*R. P.*	
H. M. L.	4	*M. S.*	10	*F. G.*	
S. W.	5	*R. W.*	11	*W. F.*	
Defendants.	6	*T. T.*	12	*J. M.*	

Gentlemen of the Jury,

The Charge to the Jury.

YOU are to enquire of, and aſcertain the old Mears and Bounds (of the within named Moſs or Bog, commonly called the, *&c.*) if any ſuch appear to

to you to be; and if none appear to you, then you are to make, lay out, and aſcertain ſuch reaſonable Mears and Bounds between the within Plaintiff, and the within named Defendant; having regard to the Length of the profitable Lands adjoining to ſaid Bog or Moſs, belonging to the ſaid Plaintiff and ſaid Defendants, as to you ſhall ſeem meet and reaſonable.

The Finding.

The Finding. We find the old Drain leading from the ſaid Moſs Side by the End of that Part thereof called the, *&c.* in Mr. *M*'s. Eſtate, and ſo on from thence to that Part of the ſaid Moſs, where we cauſed a Pole and white Flag to be erected thereon, where ſome Sods or Turf were cut out this Day by our Order, for the better aſcertaining that Part thereof to be the antient Marſh, Diviſion, Mear and Bounding, between the ſeveral Eſtates of the ſaid Biſhop of *D.* and of the ſaid *R. H. M.* and that no other is, or was, the old and antient Mears and Bounds of the ſaid, *&c.* between the ſaid Biſhop of *D.* or his Predeceſſors, Biſhops of *D.* (for the Time being) and the ſaid *R. H. M.* Eſq; and his Predeceſſors. And we further find, that from the Part above deſcribed, where the Sods or Turf were this Day ſo cut, by our Order, in the ſaid Moſs, and ſo on in a direct Line, to that

that Part in the ſaid Moſs, known by the Name of the, *&c.* and ſo on from thence in a direct Line, leading to, *&c.* but to terminate at the Verge of the County of *A.* to be the antient and only Mears and Bounds between the ſaid Biſhop of *D.* and his Predeceſſors, Biſhops of *D.* and the ſaid *A. B.* and his Predeceſſors, and the above named *S. W.* Eſq; and his Predeceſſors; that, that Mearing and Bounding, as laſt above deſcribed, and no other is, or was the antient Mears and Bounds of the ſaid, *&c.* between the ſaid Biſhop of *D.* and his Predeceſſors, Biſhops of *D.* for the Time being: And the ſaid *A. B.* and his Predeceſſors, and thoſe under whom he and they derive Time out of Mind.

And we further find and lay out, as a reaſonable Mearing and Bounding between the ſaid *R. H. M.* Eſq; and the within named *S. W.* Eſq; (no Proof of any antient Mearings appearing to us) that from that Part where we cauſed a Pole and white Flag to be erected in the ſaid Moſs, in a direct Line, to the extreme Part of the ſaid *A. B's.* Farm, in the ſaid Mr. *W's.* Eſtate, (being the Marſh between the ſaid Mr. *B.* and the Revd. Doctor *J's.* Farm, on the Borders of the ſaid Moſs) with regard to the Length of the profitable Lands adjoining thereto, to be a reaſonable Mearing and Bounding in the ſaid Moſs, between the ſaid *R. H. M.*

R. H. M. Eſq; and the ſaid *S. W.* Eſq; their ſeveral Eſtates.

J. H.	*J. G.*	*H. C.*	*M. S.*
E. H.	*W. T.*	*H. W.*	*R. W.*
R. P.	*J. M.*	*J. P.*	*T. T.*

The Commiſſioners Certificate of the Execution of the Commiſſion.

To the Right Honourable the Lord Chancellor, Treaſurer, Lord Chief Baron, &c. The Commiſſioners Certificate.

May it pleaſe your Lordſhips,

A. B. Plaintiff. *H.* Ld. B. of *D. R. H. M.* and *S. W.* Eſqrs. Defts. } IN Obedience to his Majeſty's Commiſſion of Partition to us directed, and hereunto annexed, we humbly certify unto your Honours that we on the Day of, *&c.* proceeded in the Execution of the ſaid Commiſſion, and that the High Sheriff of the County of *D.* purſuant to our Precept to him for that purpoſe directed, returned a Jury of twenty-four good and lawful Men of the ſaid County, in order to ſettle and aſcertain the Mears and Bounds of the Bog or Moſs in the ſaid Commiſſion mentioned, between the Plaintiff and Defendants, out of which twenty-four, a Jury of twelve good and lawful Men were by us duly ſworn, who (having perambulated the ſaid Moſs or

or Bog, and having heard the Evidence of ſeveral Witneſſes produced on the behalf of the ſaid ſeveral Parties reſpectively) returned to us their Verdict, under their reſpective Hands and Seals, which ſaid Verdict we have annexed to the ſaid Commiſſion: And we do hereby approve of, ratify, and confirm the ſaid Verdict, as far as in us lies, in every Article and Particular of the ſame. And we do hereby certify, that the Mears and Bounds of the ſaid Moſs or Bog, ſo found by the ſaid Jury, and aſcertained, and laid out by their ſaid Verdict, are the true, antient, and reaſonable Mears and Bounds of the ſaid Moſs or Bog, between the Plaintiff and Defendants, reſpectively. All which we humbly certify, this Day, of *&c.*

V.	*J.*	*T.*	*S.*
M.	*W.*	*T.*	*W.*
T.	*S.*	*S.*	*C.*

Pauper.

Pauper.

IT often happens that ſome Perſons may have Right to an Eſtate, or other Thing, yet not wherewith to proſecute that Right, or elſe may be proſecuted, or made Parties to a Suit, yet have not wherewith to enable them to make either

a Defence, or a Diſcovery; in ſuch Caſes this Court will admit ſuch Perſons, either to ſue or defend in *Forma Pauperis*.

By the fifty ſecond general Rule, he that would be admitted in *Forma Pauperis*, muſt have a Petition drawn up, ſetting forth briefly, the Nature and Subſtance of his Caſe; the Contents of which Petition, he muſt by an Affidavit at the Foot thereof, ſwear to be True; and muſt alſo inſert in ſuch Affidavit, that he is not worth five Pounds in any worldly Subſtance, (the Matter in Diſpute excepted) and that he hath not aſſigned over his Effects to any Perſon whatſoever, to enable him to make ſuch Oath.

RULE. The Requiſites to be performed to be admitted a *Pauper*, and the Proceedings. Ibidem.

And when this Affidavit is ſworn, a Baron is to ſign the Order of Reference, to the Counſel mentioned in the Petition, to report whether the Petitioner has any juſt Cauſe of Suit; and this Order is to be wrote after, or under the Affidavit.

Ibidem.

Then the Lawyer is to ſign his Report underneath the Order, that he hath examined and conſidered the Petition, and finds that the Petitioner hath good Cauſe of Suit, which he certifies to the Baron.

Ibidem.

Ibidem. Then upon Counſel's Motion, on behalf of the Petitioner, on the Petition, Affidavit, Order, and Certificate, the Court will Order the adverſe Party to ſhew Cauſe (if any he can in four Days after Service of the Order, why the Petitioner ſhould not be admitted.

Ibidem. Then the oppoſite Party is to be ſerved with a true Copy of the Petition and Affidavit, Order of Reference and Certificate, and Order to ſhew Cauſe; and upon an Affidavit of ſuch Service made and filed, and a Certificate from the Chief Remembrancer, of no Cauſe being ſhewn, why the Petitioner ſhould not be admitted, and upon Motion thereon to be made by the Attorney for the Petitioner, after the ſaid four Days for ſhewing Cauſe are expired, the Order will be made abſolute, and the *Pauper* admitted.

Ibidem. The Order to ſhew Cauſe againſt the Admittance of the *Pauper* ſhould be perſonally ſerved, if poſſible; but Service at the Place of the adverſe Party's Abode will do.

A Perſon admitted to defend as a *Pauper*. And he that defends in *Forma Pauperis* is to obſerve the ſame Rules, only in this Caſe, the Certificate of the Counſel is not neceſſary.

A

A Perſon is not to be admitted a *Pauper* in more than one Cauſe, without ſpecial Order of Court.

Pauper to be admitted but in one Cauſe, without ſpecial Order.

By the 74th general Rule, where a *Pauper* ſues in this Court, and will not refer the Matter in Queſtion, after that the Defendant hath anſwered or pleaded; in ſuch Caſe, the Court, upon Motion of the Defendant's Attorney, will give the *Pauper* four Days to ſhew Cauſe why he ſhould not refer, and if within that Time, he will neither comply, nor ſhew good Cauſe to the contrary; the Court may *diſpauper* him, if they think fit.

RULE.
A *Pauper* Plaintiff, after the Defendant hath anſwered or pleaded, muſt refer, if required ſo to do, or the Court will *diſpauper* him.

After a *Pauper* is admitted, no Fee, Profit, or Reward (except *Pauper*'s Fees, which are Clerks Fees only) is to be taken of the *Pauper*, by any Counſel or Attorney, or any Officer of the Court, for the Diſpatch of Buſineſs, whilſt it depends in Court, and he continues in *Forma Pauperis*; nor ſhall any Contract or Agreement be made for any Recompence or Reward afterwards: And if any Perſon offending herein ſhall be diſcovered unto the Court, he ſhall undergo the Diſpleaſure of the Court, and ſuch further Puniſhment as the Court ſhall inflict: And if any *Pauper* offend herein, he ſhall be *diſpaupered*, and never again be admitted in the ſame Suit, in *Forma Pauperis*. See *Ord. Ch.* 152. See 10th *Cha.* 1. *Seſs.* 2. *Ch.* 17.

What Fees a *Pauper* is to pay.

Ibidem.

But altho' the Officers of the Court take no Fees, ſtrictly ſo called, of a *Pauper*, yet they make him pay for the Labour of Writing, which is after the Rate of two Pence *per* Sheet.

Pauper ſelling or contracting for the Benefit of his Suit, the Cauſe to be diſmiſſed.

And if it be made appear to the Court, that any *Pauper* has ſold, or contracted, for the Benefit of his Suit, or any Part thereof, while the ſame is depending, ſuch Cauſe ſhall be thenceforth wholly diſmiſſed, and never again retained. 1 *Har. Cha. Prac.* 268. *3d Edit.*

Pauper may be *diſpaupered* upon its appearing to the Court that he is of Ability to ſue.

And as a Party may be admitted in *Forma Pauperis*, at any Time pending the Suit, ſo may he be *diſpaupered* at any Time, upon its being made appear to the Court, that he is of ſuch Ability, that he ought not to be in *Forma Pauperis:* And in a Caſe of this Nature, where it was ſhewed to the Court, that a *Pauper* was in Poſſeſſion, and received the Rents of the Lands in Queſtion, the Court ordered him to be *diſpaupered*, tho' the Defendant had a Verdict at Law, and might thereupon take a Writ of Poſſeſſion, *&c. Ibidem.*

But a *Pauper* ſhall not be *diſpaupered* for a ſmall Penſion coming to him after he is admitted.

But it was determin'd by Lord Chancellor *Jocelyn*, afterwards Lord *Newport*, in the Caſe of Lord *Doneraile*, againſt Lady

Lady Dowager *Donegale*, *February* 19, 1742, that a Penſion of 100l. *per ann.* granted by the Crown to a Lady of Quality, is no Reaſon to *diſpauper* her: But note, ſhe was admitted a *Pauper*, before the Grant of the Penſion: And a Caſe was cited, where a *Pauper* being put upon half Pay, (which was but 27l. *per ann.*) was not admitted as ſufficient Cauſe to *diſpauper* him.

Both Plaintiff and Defendant may be admitted in *Forma Pauperis*, in the ſame Cauſe; but this has been complained of as an Abuſe, for that it tends much to the Diſquiet of the Court, and encourages the Parties to be Vexatious. Yet where it is a Matter of Conteſt, and the Matter ſeems dubious, the Court will admit both Plaintiff and Defendant to ſue and defend in *Forma Pauperis*. 1 *Har. Ch. Pract.* 268. 3d Edit.

Both Plaintiff and Defendant may be admitted to ſue as *Pauperi.*

And if a Cauſe goes againſt a *Pauper*, he ſhall not pay Coſts to the Defendant, but he may be puniſhed perſonally, as the Court ſhall think fit, yet ſuch Puniſhment is very ſeldom inflicted. *Ibidem.* And ſee the ſaid *Stat.* 10 *Cha.* 1 *Seſs.* 2. c. 17.

Paupers not to pay Coſt but to be perſonally puniſhed, as the Court ſhall think fit.

A Perſon by getting himſelf admitted a *Pauper*, cannot diſcharge himſelf of Coſts he was liable to, precedent to his Admiſſion. *Moſeley's Rep.* 68.

Cannot diſcharge himſelf of Coſts he was liable to before his Admiſſion.

On a Decree for a *Pauper* Plaintiff, for the Duty and Coſts, he ſhall only have the Coſts he ſhall make appear he had paid, or was to pay.

The Plaintiff brought a Bill in *Forma Pauperis*, and had a Decree to recover the Duty with Coſts, and the Maſter taxed Coſts as uſual, for Perſons not *Paupers:* But upon Motion, the Court ordered the Plaintiff and his Solicitor to make Oath before a Maſter, what they had paid, or were to pay, and that to be allowed, but no further. *Preced.* in *Ch.* 219. *Sed quær.* for this was giving the Defendant, who, was not a *Pauper*, the Benefit of the Admiſſion, and of what the Officers of the Court and others ſeem rather entitled to.

Plaintiff if poor may bring a Bill of Review, without paying Coſts.

Plaintiff allowed to bring a Bill of Review, without paying Coſt in the Original Cauſe, he ſwearing he was not worth 40l. beſides the Matters in Queſtion. 1 *Vern.* 261.

A Perſon may be admitted in *Forma Pauperis*, altho' he hath an Annuity, if he be not in Receipt of it, and altho' his Wife hath a Fortune, if he has not a Power or Control over it.

In the Caſe of *Nugent* againſt *Nugent*, in *Chancery*, 11th *November* 1749, the Plaintiff was allowed to ſue in *Forma Pauperis*, altho' it appeared to the Court, that he had an Annuity of 40l. a Year, a Charge on the Defendant's Eſtate, and although his Wife had an Intereſt in ſome Houſes; but it appeared to the Court, by the Defendant's Affidavit, on the Motion to ſhew Cauſe againſt the Admiſſion, that he had ſtopped the Plaintiff's Annuity, for

for ſome Time, to reimburſe himſelf a Sum which the Plaintiff had received over and above his Annuity, he having been in Receipt of the Rents of the Defendant's Eſtate: And it having alſo appeared, that the Wife's Fortune was ſettled on herſelf, and that the Huſband, the Plaintiff, had no Power to intermeddle therewith.

Perambulation.

RULE. Commiſſion of Perambulation, the Proceedings in obtaining it.

BY the 78th general Rule, Commiſſions of Perambulation are to iſſue of Courſe, (as heretofore) upon a joint Bill, to be ſigned by Counſel and Attorney on both Sides, or by Conſent of the Defendant, or his Attorney in Writing, and ſo to be ſped purſuant to a general Order of Inſtructions of this Court, bearing Date the 3d of *July*, 1699, a Copy whereof is to iſſue, and be affixed to the ſaid Commiſſion as thereby is required; but ſuch Commiſſion not to prejudice any other Perſons who are not Parties thereto.

In what Caſes granted, and generally by Aſſent of Parties.

This Writ ought to be ſued with the Aſſent of both Parties, where they are in Doubt of the Bounds of their Lordſhips, or of their Towns; then they, by Aſſent, may ſue this Writ, directed unto Commiſſioners appointed to

make the Perambulation, and ſet the Bounds and Limits between them in Certainty.

Commiſſions of Perambulation ſometimes granted without Conſent of Parties; and in what Caſes, and for what Purpoſes.

In Caſes where Commiſſions of Perambulation are requiſite, though the Parties do not conſent, the Court often decree ſeveral Sorts of Commiſſions, as to diſtinguiſh, to divide Lands, to ſeparate by Oaths of Witneſſes, to view and certify Incroachments, to ſurvey and examine the Mears and Bounds of Lands; in which Caſe the Surveyor-General is uſually ordered to appoint two indifferent Surveyors, who return their Survey, and certify to the Court what they do; which Certificate being confirmed, the Cauſe is ſet down thereupon and upon the Merits, and the Court do then decree according to the Exigency of the Caſe.

May be for diverſe Towns, and in diverſe Counties.

The Parties ought to appear; if they cannot, ſhould impower others to appear for them by *Dedimus*.

And in *Fitzherbert's Natura Brev.* 134 (B) it is ſaid, that a Perambulation may be made for diverſe Towns, and in diverſe Counties; and the Parties ought to come in Perſon into the *Chancery*, and there acknowledge and grant, that a Perambulation be made between them; and the Acknowledgment ſhall be enrolled in the *Chancery*, and thereupon the Commiſſion ſhall iſſue forth: And if the Parties cannot come into *Chancery*, then they ought to ſue forth a Writ of *Dedimus Poteſtatem*, directed to certain Perſons to take their Acknowledgment,

ledgment, and to certify the ſame into *Chancery*, under their Seals, *&c.* and then, upon that Certificate returned into *Chancery*, that Commiſſion or Writ may be granted, although the Parties do not appear in Perſon in *Chancery* to pray the ſame.

Commiſſion of Perambulation to trace out the Mears and Bounds of Lands, and the Proceedings thereon.

Where the true Mears and Bounds of Lands, between two or more Proprietors, are uncertain and in Diſpute, in ſuch Caſe, any one or more of the Proprietors may cauſe a Bill to be filed, againſt the other Proprietor or Proprietors, and therein pray for a Commiſſion of Perambulation, for tracing and ſetting forth the true and ancient Mears and Bounds of the Lands in Diſpute.

Ibidem.

And the Court, upon the Hearing of the Cauſe, will accordingly award a Commiſſion of Perambulation, which is uſually directed to four Commiſſioners, two to be named by the Plaintiff, and two more by the Defendant, impowering them to enter upon and perambulate and trace out the Mears and Bounds between the Lands in Diſpute, and alſo to examine all ſuch Witneſſes as ſhall be produced before them, as well on Behalf of the Plaintiff, as of the Defendant. See the Caſe of Sir *Peter Leiceſter* againſt *Weldon*, in *Chancery*, *Trinity-Term*, 1751.

The

The Inſtructions for executing the Commiſſion of Perambulation, are contained in the Order or Decree, and alſo ſhortly expreſſed in the Commiſſion, to which the decretal Order is uſually annexed. And it is uſually inſerted in the Order, that in Caſe the Plaintiff and Defendant ſhall not agree in the Nomination of one or more Surveyor or Surveyors, then the Surveyor-General to appoint an able and ſufficient Surveyor to take the Survey; and ſometimes it is ordered, that he ſhall appoint two Surveyors; and it is alſo ſometimes ordered, that for the Benefit of all Parties, and to prevent any further Diſputes, that the Map be lodged in the Surveyor-General's Office.

If the Parties do not agree in the Nomination of a Surveyor, the Surveyor-General is to appoint one.

If they do agree, a Conſent is to be entered into.

If the Parties do agree in the Nomination of a Surveyor or Surveyors, then an Agreement or Conſent in Writing, to that Purpoſe, is uſually entered into between the Parties, which may for Safety be made a Rule or Order of the Court. If they do not agree, then a ſhort Order is to be made out to the Surveyor-General, who, upon receiving the ſame, will nominate and appoint one or more able and ſufficient Surveyors, according to the Order. See the Caſe of the Executors of *Ryan* againſt *Spaight*, in this Court, *Eaſter-Term*, 1743.

And

And in either Caſe, when the Commiſſion is executed, the Commiſſioners are to certify their Proceedings in the Premiſſes to the Court, by a Certificate, which is to be indorſed on or annexed to the Commiſſion, and to be ſigned by all the Commiſſioners who attended thereon; and a Survey or Map of the Lands is to be returned therewith: The Form of which Certificate, I have inſerted here, as well to ſhew the Method of Proceeding upon the Perambulation, as the Form of the Certificate.

A Certificate of the Proceedings to be returned by the Commiſſioners.

To the Right Honourable the Chancellor, Treaſurer, Lord Chief Baron, &c.

May it pleaſe your Lordſhips,

P. B. Plaintiff. *A. W.* Defendant. } PURSUANT to a Commiſſion of Perambulation, in this Cauſe directed to us, *J. B. T. C. J. P.* and *W. D.* we did, on the Day of , by Virtue of the ſaid Commiſſion, enter into the Lands of *S.* and *S.* in the ſaid Commiſſion mentioned; and having duly ſworn *M. G.* of, *&c.* and *P. K.* of, *&c.* the Witneſſes produced for the Plaintiff, as alſo *J. K* of, *&c.* and *L. M.* of, *&c.* the Witneſſes produced on the Behalf of the Defendant; and having alſo ſworn *R. G.* of, *&c.* Sur-

The Form of the Certificate.

Surveyor, as a Surveyor, as well on the Part of the Plaintiff as on the Defendant, did proceed to perambulate the Mears and Bounds between the ſaid Lands of *S.* and *S.* And We, the ſaid *J. B. T. C. J. P.* and *W. D.* did cauſe the ſaid Lands of *S.* and *S.* to be ſurveyed by the ſaid *R. G.* and the ſaid *R. G.* did, according to the Mears, Metes, and Bounds, ſhewn and traced out by the ſaid *M. G.* and *P. K.* Witneſſes produced on Behalf of the Plaintiff, on their Oaths, ſurvey the ſaid Lands of *S.* and *S.*; and the Mears, Metes, and Bounds between the ſaid Lands of *S.* and *S.* ſo ſhewn and traced out on Behalf of the Plaintiff, appear to us as follows, *to wit*, We began at the Ditch on the Road leading, *&c.* from thence to the Place where, *&c.* (as it was traced) which ſaid Bounds are the Bounds claimed by the Plaintiff as the ancient Bounds between the ſaid Lands of *S.* and *S.* And we the ſaid *J. B. T. C. J. P.* and *W. D.* did alſo cauſe the ſaid Lands of *S.* and *S.* to be again ſurveyed by the ſaid *R. G.* according to the Mears, Metes, and Bounds claimed by the Defendant, as the Mears, Metes, and Bounds between the ſaid Lands of *S.* and *S.*; and the ſaid *R G.* accordingly did ſurvey the ſame according to the Mears, Metes, and Bounds ſhewn and traced out by the ſaid *J. K.* and *L. M.* Witneſſes produced on the Behalf

Behalf of the Defendants on their Oaths; and the Mears, Metes, and Bounds between the ſaid Lands of *S.* and *S.* traced out on Behalf of the Defendant appear to us as follows, *to wit*, We began at the Ditch, *&c.* (as it was traced) which ſaid Bounds are the Bounds claimed by the Defendant as the ancient Bounds between the ſaid Lands of *S.* and *S.* as by a Map of the ſaid Lands, according to the different Tracings by the Plaintiff and Defendant; and the Depoſitions of the ſaid Witneſſes hereunto annexed may appear.

All which we certify, and humbly ſubmit to your Lordſhips this Day of , *&c.*

J. B.
T. C.
W. D.
J. P.

How the Certificate is to be returned.

And this Certificate is to be returned with the Commiſſion, Depoſitions, and the Survey or Map of the Land, in like Manner as other Commiſſions and Depoſitions are returned; and a Duplicate of the Map is to be alſo lodged in the Surveyor-General's Office.

And when the Certificate is thus annexed to the Commiſſion, the Commiſſioners

miſſioners are to indorſe upon the Commiſſion the following Return:

The Return to be indorſed on the Commiſſion.

The Execution of the within Commiſſion appears by the Depoſitions, Certificate, Map, and Survey hereunto annexed.

J. B.
T. C.
W. D.
J. P.

The Hearing of the Cauſe on the Return of the Commiſſion.

When the Commiſſion, *&c.* are ſo returned as aforeſaid, and filed, then Publication is to paſs, and the Cauſe to be ſet down in the uſual Manner; and the Court will decree according to the Merits, and aſcertain the Bounds, and will grant an Injunction, or ſuch other Proceſs as ſhall be neceſſary for the Execution thereof; but if there be a Contrariety or Uncertainty in the Evidence, they will direct an Iſſue at Law. So ordered in the aforeſaid Caſe of Sir *Peter Leiceſter* againſt *Weldon*, in the Court of *Chancery*.

A Commiſſion of Perambulation for a Partition of Lands, purſuant to a Decree, and the Proceedings thereon.

So likewiſe, where a Bill is filed for a Partition of Lands, the Court upon the Hearing will award a Commiſſion of Perambulation, directed to certain Commiſſioners as aforeſaid, impowering them to enter upon and perambulate the Lands where the Partition is to be made, and

and to divide, diſtinguiſh, ſeparate, and make an equal Partition thereof, by diſtinct Mears and Bounds, to and among the Parties to the Suit. See the Caſe of *Smith* and *Fuller*, in this Court, *Hillary-Term*, 1742.

And the Form of the Certificate in this Caſe, which may either be annexed to or indorſed thereon, is as follows:

Form of the Certificate indorſed on the Commiſſion.

WE the Commiſſioners for the Plaintiff and Defendant, in the within Writ named, have this Day, that is to ſay, the Day of , entered upon and perambulated the Town and Lands of *C.* in the ſaid Writ mentioned, and have divided, diſtinguiſhed, ſeparated, and made an equal Partition of the ſaid Lands and Premiſſes, by diſtinct Mears and Bounds, to and among the Plaintiff and Defendant, that is to ſay, one equal Moiety or Half Part of the ſaid Lands and Premiſſes, with Regard to Quantity, Quality, and Value, being arable Land, Paſture and Mountain, to the Defendant *J. F.* containing ninety-ſeven Acres, as appears by a Map hereunto annexed, being the South Point of the ſaid Lands, as appears by the ſaid Map; and one Hundred Acres of arable Land, Paſture and Mountain, unto the Plaintiff *J. S.* being the other equal half Moiety, or half Part, with Regard to Quantity, Quality, and Value, lying in the North Point

Point of ſaid Lands, as appears by the ſaid annexed Map, to be held by them and their Heirs in Severalty, from the other equal Moiety or half Part of the ſaid Premiſſes, according to their reſpective Rights: All which we humbly certify, under our Hands and Seals reſpectively, the Day and Year above written.

G. N. (Seal)
J. S. (Seal)
S. L. (Seal)
S. G. (Seal)

In this Caſe there is not to be any further Hearing, but the Court will confirm the Partition if they ſee fit, and if no ſufficient Cauſe be ſhewn to the contrary.

And the Map of the Land is to be returned with the Commiſſion, Certificate and Decree; and in this Caſe there is to be no further Hearing, but a Motion is to be made, which may be made either by Counſel or Attorney, that the Partition ſo made, purſuant to the Decree, may be confirmed, unleſs Cauſe, which the Court will order; and if no Cauſe be ſhewn, in four Days after Service of the Order, why the Partition ſhould not be confirmed, the Court, upon Affidavit of the Service of the Order, a Certificate from the Chief Remembrancer of no Cauſe being ſhewn againſt confirming the Partition; and upon an Attorney's Motion thereon, will confirm the Partition abſolutely. See *the aforeſaid Caſe of* Smith *and Fuller*, Eaſter-Term, 1743.

Plead-

Pleadings.

Pleadings what, and the ſeveral Sorts, and how to be prepared by Counſel and Attorney.

A PLEADING in the common Acceptation, is the Saying of the Parties Plaintiffs and Defendants, or the Matters inſiſted upon by each of them, in the progreſs of the Cauſe; which being ingroſſed on Parchment, and ſigned by the Counſel and Attorney in the Cauſe, for either Party (and ſworn if an Anſwer or Plea) is called a Pleading, and are as follow, to wit,

1 *A Bill.* The Plaintiff's Pleading.
2 *Anſwer.* The Defendant's Pleading.
3 *Plea.* The Defendant's Pleading.
4 *Demurrer.* The Defendant's Pleading.
5 *Replication.* The Plaintiff's Pleading.
6 *Rejoinder.* The Defendant's Pleading.

Which before-mentioned Pleadings, are the Ground and Foundation of all Cauſes before they come to be heard in Court.

RULE.
No Pleading allowed to be filed until the former Pleading be taken out.

And Note, by the 81ſt general Rule, no Anſwer ſhall be admitted to be filed, unleſs it ſhall appear in the Office that a Copy of the Bill hath been taken out; and no Replication, unleſs in like Manner a Copy of the Anſwer hath been taken out; and this Rule is obſerved

in the filing of all Pleadings after the Bill.

RULE. Pleadings what to contain, and how to be prepared by Counſel and Attorney.

By the 10th general Rule, *pars*, Counſel is to be careful, that Bills, Anſwers, Exceptions, Interrogatories, and other Pleadings, do not contain needleſs Repetitions of Deeds, Writings or Records, in *hæc Verba*, but only the Effect and Subſtance thereof, and that which is pertinent and material to be ſet down.

Impertinencies in Pleadings, what.

As to Impertinencies, Pleadings are ſaid to be impertinent, when they are ſtuff'd with long Recitals, or with long Digreſſions of Matters of Fact, which are altogether unneceſſary, and totally immaterial to the Point in Queſtion; as where a Man ſets forth a Deed (the Subſtance or Material Parts of which are only prayed to be ſet forth) in *hæc Verba*, where he ſtuffs his Anſwer with long Recitals, which are nothing to the Purpoſe; as if in a Bill of Revivor, the Party ſets forth in *hæc Verba*, not only the Original Bill and Anſwer, but the whole Proceedings in the Cauſe; whereas all theſe being Matters of Record, and for which the Party hath once paid for Copies, he ought not to pay over again. Beſides there is no Occaſion to ſet them forth over again in *hæc Verba*, or to make an unneceſſary Repetition thereof; ſo that if no new Matter ariſes by

by the Abatement, it is ſufficient to ſet them forth, in this ſhort conciſe Manner, to wit,

"That your Orator, in or about "ſuch a Term, exhibited his origi- "nal Bill of Complaint, in this Ho- "nourable Court, againſt ſuch and "ſuch Perſons, to be relieved, touch- "ing certain Matters and Things there- "in contained, as by the ſaid Bill du- "ly filed, and remaining of Record in "this Honourable Court, appears (car- "ry it no further). That the Defen- "dant, ſuch a Day, put in his Anſwer, "as by the ſaid Anſwer remaining "of Record, may alſo appear: That "Witneſſes being examined, Publica- "tion paſſed, and the Cauſe being at "Iſſue, came on to be heard ſuch a "Day, when it was ordered and de- "creed ſo and ſo:" And here are taken in the Words of the ordering Part of the Decree very ſhortly, and no more than what is material to the Revivor, *&c.* The Method of drawing a Bill of Revivor.

But note, if any new Matter hath ariſen by the Abatement, which makes it neceſſary to add a new Charge, that may be inſerted in the Bill of Revivor; as the Plaintiff may pray a Diſcovery of Aſſets in the Hands of an Heir, or Executor, and a *Subpœna* to revive and anſwer; in which Caſe the Ibidem.

Defendant muſt anſwer thereto, and the Court will then, upon an Attorney's Motion, order the Cauſe to ſtand revived.

RULE. All Pleadings to be ſigned by Counſel, and Attorney allowed to Practice.

And by the aforeſaid Tenth general Rule, *pars*, all Pleadings are to be ſigned by Counſel, allowed to Practice, with his own Hand, being firſt peruſed by him in the Paper Draught, before it be engroſſed, and the Pleading to be fairly engroſſed without Razures, Blottings, or Interlineations, and to be ſigned by the Attorney in the Cauſe.

A Pleading ſigned by an *Engliſh* Barriſter, not allowed here.

In the Caſe of *Woogan* againſt *Jones*, in this Court, 31ſt *May*, 1731, an Anſwer and Plea ſworn before Lord *Burlington* the Treaſurer, and ſigned by Mr. *Newman*, an *Engliſh* Barriſter, was brought over here ſealed, and an Affidavit made, that it was not opened, or altered, and the Anſwer was filed; but upon Motion of the Plaintiff's Counſel, it was ordered, that the Anſwer and Plea ſhould not be accepted of, in regard they were not ſigned by a Counſel, allowed to practice here, purſuant to the Order.

RULE. No Perſon to counterfeit the Hand-Writing of any Counſel to any Pleading, and the Penalty for ſo doing.

By the 88th general Rule, no Perſon to counterfeit the Hand-Writing of any Counſel, to any Bill, Anſwer, Plea, Demurrer, Exceptions, or Interrogatories, without Authority from ſuch Counſel, by the Paper Draught of ſuch

ſuch Bill, *&c.* or other Warrant, in Writing, from him; and any Perſon acting contrary to this Rule (unleſs the Counſel will come to the Bar and acknowledge that his Hand was ſo put by his Conſent) to be committed, and ſuch Bill to be diſmiſſed with Coſts; and ſuch Plea or Demurrer to be overruled with Coſts, and the Anſwer to remain on the File, and Defendant to anſwer over with Coſts, at the Election of the Plaintiff, and not otherwiſe; and ſuch Interrogatories to be referred to one of the Barons of the Court: And ſhould any of them be found to be leading, the Depoſitions of ſuch Interrogatories to be ſuppreſſed according to a former Rule. But if the Interrogatories are not leading, then the Party ſo counterfeiting the Name of the Counſel, to be committed as aforeſaid; and further to give ſuch Amends to the Counſel, as the Court ſhall think fit.

RULE. Pleadings, if ſcandalous, good Coſts ſhall be paid to the injured Party.

By the 20th general Rule, if any Pleading ſhall contain any ſcandalous Matter, and upon Reference and Report ſhall ſo appear, both the Parties and Counſel, on whoſe Side, and under whoſe Hand-Writing it paſſeth, ſhall pay good Coſt to the Party injured; and ſuch Counſel ſhall receive the Reproof of the Court, and the Crime will be adjudged more groſs, if it ſhall appear that ſuch Pleading paſſed under his Hand without a deliberate Peruſal.

On a ſcandalous Anſwer, Defendant ordered to pay Plaintiff 100*l.*

A Defendant was ordered to pay the Plaintiff One Hundred Pounds, for putting in a ſcandalous Anſwer. 2 *Cha. Rep.* 386. See *Bunb. Rep.*

The conſtruction of Scandal in Pleadings,

But as to Scandals, there are many Caſes, where tho' the Words of the Pleading appear to be very ſcandalous, and highly reflecting upon the Party, yet where the ſcandalous Matter is a neceſſary Part of the Cauſe, and material to the Caſe or Defence of either Party, or tends to a Diſcovery of the very Point in Queſtion, the Court will not conſider it as ſcandalous. And if ſuch Matter be charged in a Bill, the Court will compel the Defendant to anſwer it, and eſpecially, if the Plaintiff offers by his Bill to prove it. See the Caſe of *Croſton* againſt *Croſton*, in *Chancery*, *Trinity* Term, 1747.

Ibidem.

But where the Scandal is altogether immaterial and foreign, to the Point in Queſtion, and no way relates to the Merits of the Cauſe, but is done meerly out of Pique and Malice; or if the Defendant ſhall by his Anſwer deny the Fact, and that it ſhall not be ſufficiently ſupported by the Plaintiff's Proof; in either of theſe Caſes, upon the Baron's Report, the Scandal ſhall be expunged, and the Court will give the Party Coſts for this Vexation; and generally

generally the Party injured ſhall have full Coſts, and ſometimes exemplary Coſts are awarded, according to the Circumſtances of the Caſe.

After an Anſwer is come in, it is too late to refer the Bill for Impertinence, but never too late to refer it for Scandal. *Bunbury's Rep.* 53. 304. *Woodworth* againſt *Aſtley* *.

Bill may be referred for Scandal after anſwer, but not for Impertinence.

* There is not any Matter of Practice in the Books which appears to be leſs ſettled than this, in regard to ſcandalous Pleadings. It has been always the Practice, not to refer a Bill for Impertinence after an Anſwer, in regard the Defendant, by ſubmitting to anſwer, waives the Impertinence. So it was a ſtanding Rule of Courts of Equity, until altered by Lord Chancellor *King*, in *Michaelmas*, 1725. 2 *Williams*, 312, 313, That a Bill might be referred for Scandal, not only after Anſwer, but after Hearing, and even by a third Perſon, not a Party to the Suit, as Courts are concerned to keep their Records clean, and without Dirt or Scandal appearing thereon. And on altering the old Rule, his Lordſhip ſaid, that in the Reaſon of the Thing, the Rule ought not to be as it was; for when the Defendant has ſubmitted to anſwer the Bill, why ſhould he after that procure the Bill to be altered, and by that Means be made a new Bill? Beſides, it occaſioned great delays; tho' it was objected by Counſel, that it was an Argument, the Defendant did not move to refer the Bill for Delay, when he firſt anſwered the Bill before he referred it for Scandal. But as this Determination in *Bunbury's Reports*, is the lateſt I have met with, I have ventured to ſet it down as the proper Practice in this Caſe, and as it would be very hard, that a Matter of falſe Scandal ſhould remain againſt a Man recorded for ever. It is well worth while to read the *Regiſter*'s Notes of the Arguments in the aforeſaid Caſe of *Croſton* and *Croſton*, in *Chancery*, as no Caſe was ever better debated.

So it is with an Anſwer, after referred for Inſufficiency.

So after an Order to refer an Anſwer for Inſufficiency, it cannot be referred for Impertinence, yet it may for Scandal. 2 *Williams*, 312. *Elliſon* againſt *Burgeſs*.

No demurring to ſcandalous Matter in the Bill.

The Defendant demurred to Part of the Bill, as being a Matter ſcandalous, and that it ought not to be anſwered unto, but this held not the regular Courſe. 1 *Vern.* 107.

On an Anſwer's being reported not ſcandalous or impertinent, if the Plaintiff excepts to the Report, he muſt ſhew ſpecially wherein it is ſcandalous or impertinent.

If the Plaintiff refers the Anſwer for Scandal and Impertinence, and the Maſter finds the Anſwer neither ſcandalous nor impertinent, the Plaintiff on excepting to the Maſter's Report, muſt in his Exceptions ſhew wherein, in what Line or Page, and how far the Anſwer is ſcandalous or impertinent, in order that ſuch Part of the Anſwer may be expunged by the Maſter; and it is not ſufficient in the Exceptions, to ſay in general, that the Anſwer is ſcandalous and impertinent. 2 *Williams*, 181.

As alſo where it is reported inſufficient.

It ſeems to be a ſtronger Caſe, where Exceptions are taken to an Anſwer for Inſufficiency, and the Maſter reports it ſufficient, that the Plaintiff in his Exceptions to the Maſter's Report, ſhould ſhew wherein the Anſwer is inſufficient. *Ibidem.*

Alſo,

No excepting to the Report, after the Scandal is expunged, either in Bill or Anſwer.

Alſo, if a Bill or Anſwer be referred for Scandal, and reported by a Maſter to be ſcandalous; if the Maſter has once expunged this Scandal, the Party cannot then except to the Report, becauſe, when the Scandal is expunged, it cannot then be made appear to the Court, what the Scandal was, and it was the Party's own fault, that he did not except to the Report ſooner. *Ibidem* 182.

On refererce of Pleadings for Prolixity and Impertinence, the Baron is only to conſider whether they be or be not pertinent to the ſubject Matter.

It was determined in the Caſe of *Judkins* againſt *Hickie*, in this Court, 25th *February*, 1757; That where Pleadings are referred to a Baron for Prolixity and Impertinence, the Baron is only to conſider, whether they be, or be not, pertinent to the ſubject Matter of the Pleading. And in the ſame Caſe, the following Doubts aroſe: Whether the Baron is to expunge the Part which he conceives to be prolix and impertinent, which was urged to have been formerly the Practice. But Lord Chief Baron ſaid, that would be taking upon him to judge of the Merits of the Cauſe. Another Queſtion was, whether the Baron was on the firſt Reference, to point out in what particulars the Pleading was prolix and impertinent, or only generally to report it prolix and impertinent, and to point out the Particulars on the Reference;

rence; but the Court ſaid, that if the Pleading was long, it might be an endleſs Work for the Baron to point out the Prolixity and Impertinence; and if he would not do ſo, the labouring Oar would be thrown on the Court; however the Court ſeemed inclined to take it upon them; but it was agreed by the Parties, that the Defendant ſhould anſwer as he may, and the Matter in Debate to ſtand over.

No Objection to the Order or Reference for Scandal, Prolixity, and Impertinence, after a Report.

In the Caſe of Lord *Howth* againſt *Nugent*, in the Court of *Chancery*, *Hillary* Vacation, 1759, the Plaintiff having excepted to the Defendant's Anſwer, for Shortneſs and Inſufficiency, and the Defendant having allowed the Exceptions, the Plaintiff then obtained an Order for referring the Anſwer, for Scandal, Prolixity, and Impertinence; and the Maſter having reported the Anſwer neither ſcandalous, prolix, nor impertinent, the Plaintiff excepted to the Report. On the Hearing on the Report and Exceptions, it was urged by Counſel for the Defendant, that after excepting to the Anſwer for Inſufficiency, the Plaintiff could not refer for Scandal, Prolixity, and Impertinence*; but the Court would

* The Reaſons mentioned by the Defendant's Counſel were, that by the Plaintiff's referring for Inſufficiency, he had waived the Prolixity and Impertinence; that he might have firſt referred the Anſwer

would not enter into this Matter, the Defendant not having before complained of the Order. It was then urged, that the Scandal in the Anſwer (if it was Scandal) was an Imputation on one of the Defendants of the Cauſe, and not any Imputation on the Plaintiff; but Lord Chancellor ſaid, that this Objection was of no Weight, for Courts are to take Care, that no Scandal ſhall appear upon the Face of their Pleadings, and declared the Anſwer ſcandalous.

The Plaintiff may refer a Defendant's Anſwer for Scandal, tho' the Scandal affects another Defendant in the Cauſe, not the Plaintiff.

Privilege of Parliament.

BY *Stat.* 3d. *Edw.* 4th. *Ch.* 1. Whereas the Privilege of every Parliament and great Council of this Land of *Ireland* is, that

The Privilege of Lords and Commons of Parliament, as to Suits, &c. is forty Days before and forty Days after the Parliament is finiſhed.

ſwer for Prolixity and Impertinence, and would not thereby be precluded from referring it afterwards for Inſufficiency; for, that an Anſwer may contain a great deal of Prolixity and Impertinence, and at the ſame Time be extremely inſufficient.

But if a Plaintiff could not refer an Anſwer for Inſufficiency, after he had referred it for Scandal or Impertinence, as ſome have thought (for that by ſo referring it, he had admitted it to be an Anſwer, though a ſcandalous or impertinent one, whereas an inſufficient Anſwer is as no Anſwer) nor refer it for Impertinence, after he had referred it for Inſufficiency, there might in the firſt Caſe be a perfect Failure of Juſtice, and in the other, a Defendant may, at his Pleaſure, cauſe an unneceſſary Expence and Trouble to a Plaintiff.

that no Miniſter of the ſaid Parliament, coming or going to the ſaid Parliament, during forty Days before and forty Days after the Parliament is finiſhed, ſhould be impleaded nor troubled by no mean. It is alſo enacted, that every Miniſter, as well Lords, Proctors, and Commons, be diſcharged and quitted of all Actions, had or moved againſt any of them during the Time aforeſaid; and this to endure for ever.

Explanation of the Words, in the above Act, *After the Parliament is finiſhed.*

But great Doubts having ariſen upon the aforeſaid Statute, what ſhall be underſtood or meant by the ſaid Words, *viz. After the ſaid Parliament is finiſhed*; for Explanation thereof, it was enacted, by 6 *Anne*, *Ch.* 8. *S.* 1. that for ever thereafter the Privilege of Parliament ſhall begin forty Days before the Beginning or Meeting of every Parliament, and ſhall continue during the Sitting or Adjournment, and forty Days after the Prorogation or Diſſolution of every Parliament.

Defendant in *Auter Droit* not privileged.

And by Sect. 6th, no Peer, Lord of Parliament, or Member of the Houſe of Commons, who ſhall be a Truſtee, Guardian, Executor, or Adminiſtrator, ſhall have any Benefit or Privilege of Parliament, in any Suit which ſhall be proſecuted againſt them, as Truſtee, Guardian, Executor, or Adminiſtrator, in any Court of Law or Equity, or in any Eccleſiaſtical or other Court.

By

By 1ſt *Geo.* 2d. *Ch.* 8, Suits may be commenced and proſecuted in this Court againſt any Lord of Parliament, or Member of the Houſe of Commons, or againſt their or any of their menial or other Servants, or any other Perſon intitled to the Privilege of Parliament, at any Time after fourteen Days next following the Diſſolution or Prorogation of any Parliament, until fourteen Days immediately before a new Parliament ſhall meet, or the ſame be re-aſſembled; and the ſaid Court may, at any Time after fourteen Days next following ſuch Diſſolution or Prorogation, and until fourteen Days before a new Parliament ſhall meet, or the ſame be re-aſſembled, proceed to give Judgment, and make final Orders, Decrees and Sentences, and award Execution thereupon *.

Privilege limited to fourteen Days.

But the Perſon of any Member of the Houſe of Commons, or other Perſon intitled to Privileges, is not to be arreſted for

For the Perſon forty Days.

* So that if a Copy of the Bill be ſerved on a Lord, or Commoner, the Plaintiff may, at the Expiration of the fourteen Days, mentioned in the ſaid Statute, 1 *Geo.* 2d. *Ch.* 8, proceed in his Cauſe, otherwiſe he cannot proceed until after the Expiration of the forty Days, mentioned in the aforeſaid Statute, 3d *Edw.* 4. *Ch.* 1.——But note, if the Copy of the Bill be ſerved at any Time pending the Suit, it will entitle the Plaintiff to proceed after the ſaid fourteen Days are expired; and the Copy of the Bill is to be ſigned by the Attorney for the Plaintiff.

If a Copy of the Bill be ſerved at any Time pending the Suit, the Plaintiff may proceed againſt a Lord, or Commoner, at the Times mentioned in Stat. 1 *Geo.* 2d. *Ch.* 8.

for the Space of forty Days before the Beginning or Meeting of any Parliament, or for forty Days after Prorogation or Diſſolution of this, or any other Parliament.

But a Perſon may exhibit his Bill, and proceed on Proceſs to a Sequeſtration and Diſtreſs infinite.

And any Perſon, having Cauſe of Suit or Complaint, may, in the Times aforeſaid, exhibit any Bill or Complaint, againſt any Lord of Parliament, or Member, or other Perſon intitled to the Privilege of Parliament, in the *Chancery*, or *Exchequer*, and may proceed by a Letter or *Subpœna*, as is uſual; and upon leaving a Copy of the Bill with the Defendant, or at his Houſe or Lodging, or laſt Place of Abode, may proceed thereupon; and for Want of Appearance, or Anſwer, or for Non-performance of any Order, or Decree, or for Breach thereof, may ſequeſter the real and perſonal Eſtate of the Party, as is uſed, where the Defendant is a Peer; but ſhall not arreſt or impriſon the Body of any Knight, Citizen, or Burgeſs, or other privileged Perſon, during forty Days immediately before the Beginning or Meeting of any Parliament, or during forty Days immediately after the Prorogation or Diſſolution of this or any other Parliament. See *Letters Miſſive*.

The Perſon privileged forty Days.

Suits not barred or diſcontinued by Privilege of Parliament.

And where any Plaintiff ſhall, by Reaſon or Occaſion of Privilege of Parliament, be ſtayed or prevented from proſecuting any Suit by him commenced,

ced, ſuch Plaintiff ſhall not be barred by any Statute of Limitation, or non-ſuited, diſmiſſed, nor his Suit diſcontinued, for Want of Proſecution of the Suit by him begun, but ſhall from Time to Time, after fourteen Days from the Riſing of the Parliament, be at Liberty to proceed to Judgment and Execution.

The King's Debtor not privileged, except his Perſon, forty Days.

And by the ſaid Statute, No Action, Suit, Proceſs, Order, Judgment, Decree, or Proceeding in Law, or Equity, againſt the King's immediate Debtor, for the recovery of any Debt or Duty, due unto His Majeſty, or againſt any Accountant unto His Majeſty, his Heirs, or Succeſſors, for any Part of their Revenues, or other immediate Debt, or Duty, or the Execution of any ſuch Proceſs, or Proceedings, ſhall be impeached or delayed by Privilege of Parliament; yet, ſo that the Perſons of any ſuch Debtor, or Accountant being a Peer of this Realm, or Lord of Parliament, ſhall not be liable to be arreſted, or impriſoned upon any ſuch Suit, Order, Judgment, Decree, Proceſs, or Proceeding; or, being a Member of the Houſe of Commons, ſhall not during the Space of forty Days before the Beginning, or Meeting of any Parliament, or during the like ſpace, after the Prorogation, or Diſſolution of any Parliament, be arreſted, or impriſoned upon any ſuch Order, *&c.*

By

Privilege of Parliament not to prevent proceedings in Courts of Equity.

By Stat. 11. *Geo.* 2. ch. 5. *Sect.* 1. It ſhall be lawful, during the continuance of the Privilege of Parliament, to file any original Bill in any Court of Equity, or to ſue out any original Writ, without further proceeding on ſuch Bill, or Writ, againſt any Perſons intitled to Privilege of Parliament.

Proceedings may be in *Great-Britain* or *Ireland*, againſt any Peer of *Great-Britain*, or Member of the Houſe of Commons of *Great-Britain*, or others, intitled to the Privilege of the Parliament of *Great-Britain*, immediately after Diſſolution, Prorogation, or Adjournment for above 14 Days.

By a *Brit.* Statute, 11 *Geo.* 2. ch. 24. Sect. 1. Any Perſon may commence and proſecute in *Great-Britain*, or *Ireland*, any Suit in any Court of Record, or of Equity, or of Admiralty; and in all Cauſes matrimonial and teſtamentory, in any Court having Cognizance, againſt any Peer of *Great-Britain*, or againſt any of the Knights, Citizens, and Burgeſſes of the Houſe of Commons of *Great-Britain*, or againſt their menial or other Servants, or any other Perſon intitled to the Privilege of the Parliament of *Great-Britain*, immediately after the Diſſolution, or Prorogation of any Parliament, until a new Parliament ſhall meet, or the ſame be re-aſſembled, and immediately after any Adjournment of both Houſes, for above fourteen Days, until both Houſes ſhall re-aſſemble.

But the Perſon of any Member not to be arreſted during Time of Privilege.

But by *Sect.* 2. This Act ſhall not ſubject the Perſon of any of the Houſe of Commons, or any other Perſon intitled to Privilege of Parliament, to be arreſted

arreſted during the Time of Privilege; nevertheleſs it ſhall be lawful for any of the Courts of *King*'s-*Bench*, *Common-Pleas* and *Exchequer*, in *Ireland*, after any Diſſolution, Prorogation, or ſuch Adjournment as aforeſaid, or before any Seſſion of Parliament, or Meeting of both Houſes, to uſe ſuch Proceeding and to iſſue the like Proceſs, againſt any ſuch Peer, or againſt any of the ſaid Knights, Citizens, and Burgeſſes, or other Perſons, intitled to the Privilege of the Parliament of *Great-Britain*, as the Courts of *King*'s-*Bench*, *Common-Pleas*, and *Exchequer* in *England* are, by 12 and 13th. *Will.* 3. ch. 3, impowered to uſe: And it ſhall be lawful for the *Chancery* of *Ireland*, and the Court of Equity in the *Exchequer* there, to uſe ſuch Proceeding, and to iſſue the like Proceſs againſt the Perſons aforeſaid, as the *Chancery* of *Great-Britain*, and the *Exchequer* in *England*, are by the ſaid Act impowered to uſe. And it ſhall be lawful for any of the other Courts before deſcribed, the Proceſs whereof is not particularly directed by the ſaid Act, or by this Act, after any Diſſolution, Prorogation, or ſuch Adjournment as aforeſaid, or before any Seſſion of Parliament, or Meeting of both Houſes, to iſſue like Proceſs againſt any ſuch Peer, or any of the ſaid Knights, Citizens, or Burgeſſes, or other Perſons intitled to the Privilege of Parliament, as

And the four Courts in *Ireland* may, after ſuch diſſolution, &c. proceed and iſſue like Proceſs, as the ſame Courts in *England* may by 12 and 13. *Will.* 3. ch. 13.

And if any of the Proceſs of the ſaid Courts in *Ireland*, be not particularly directed by the ſaid Act, then they may iſſue like Proceſs as they may now iſſue againſt Perſons not liable to be arreſted.

ſuch Courts may now lawfully iſſue againſt Perſons not liable to be arreſted.

Where the Proſecution of any Suit is ſtayed, by Privilege of Parliament, it ſhall not prejudice the Plaintiff, but he may proceed when Privilege is out.

And by *Sect.* 3, where any Plaintiff ſhall by Privilege of Parliament be ſtayed from proſecuting any Suit commenced, ſuch Plaintiff ſhall not be barred by any Statute of Limitation, or non-ſuited, diſmiſſed, nor his Suit diſcontinued for Want of Proſecution, but ſhall, upon the Riſing of the Parliament, be at Liberty to proceed to Judgment and Execution.

No Privilege to bar the King's Action, ſo that no Member be arreſted during his Privilege.

And by *Sect.* 4, no Proceeding in Law or Equity, againſt the King's original and immediate Debtor, for the Recovery of any Debt originally, and immediately due unto His Majeſty, or againſt any Perſon liable to render Account unto His Majeſty for any Part of His Revenues, or other original and immediate Duty, ſhall be ſtayed in any Court in *Great-Britain*, or *Ireland*, by Privilege of the Parliament of *Great-Britain*, yet ſo that the Perſon of ſuch Debtor or Accountant, being a Peer of *Great-Britain*, ſhall not be liable to be arreſted upon ſuch Suit, or being a Member of the Houſe of Commons of *Great-Britain*, ſhall not, during the continuance of the Privilege of Parliament, be arreſted upon any ſuch Proceedings.

No new Powers in real or mixt Actions.

And by *Sect.* 5, this Act ſhall not give Juriſdiction to any Court, to hold Plea

Plea in any real or mixt Action, in other Manner than ſuch Court might have done before. See *Injunctions to prevent Waſte*, and *Injunctions to ſtop Proceedings at Law*, under Title *Injunctions*.

Sequeſtration againſt a Peer for Want of an Anſwer, and he puts in an inſufficient Anſwer, new Sequeſtration *niſi*, to iſſue.

A Sequeſtration *niſi*, is the firſt Proceſs againſt a Peer, or Member of the Houſe of Commons; but if there be a Sequeſtration *niſi* againſt a Peer, for Want of an Anſwer, and the Peer puts in an Anſwer, which is inſufficient, yet the Order for a Sequeſtration ſhall not be abſolute, but a new Sequeſtration *niſi* ſhall iſſue. 3 *Williams*, 395.

Firſt Proceſs againſt the menial Servant of a Peer is a Sequeſtration *niſi*.

And ſee 1 *Williams*, 535, where it is determined to be both within the Meaning and Words of this laſt Statute, that the firſt Proceſs of Contempt againſt a menial Servant of a Peer of the Realm, for Want of an Anſwer, is a Sequeſtration *niſi*, in the ſame Manner as in the Caſe of the Peer himſelf; and Lord Chancellor ſaid if it were not ſo, as it is plain no Attachment would lie againſt their Perſons, conſequently there would be no Remedy againſt them, and they would have a greater Privilege than their Lord, if the Proceſs againſt ſuch menial Servant were to be a *Subpæna*. 1 *Williams*, *Rep.* 535.

The Court will grant an Injunction againſt a

Per Cur. Tho' the Court will not proceed againſt a Member that has Pri-

Member of Parliament, to ſtay his Suit at Law, till Anſwer, or further Order.

vilege of Parliament; yet if a Parliament Man ſues at Law, and a Bill is brought in Equity to be relieved againſt that Action, the Court will make an Order to ſtay Proceedings at Law, till Anſwer, or further Order. 1 *Vern.* 329. *Moſeley's Rep.* 125.

A Peer is to anſwer upon Honour, but his Affidavit, or his Examination as a Witneſs, either *viva Voce*, or upon Interrogatories, muſt be upon Oath.

Although the Privilege of Peerage doth allow a Peer of the Realm to put in his Anſwer, upon Honour only, yet it is reſtrained to an Anſwer; and as to all Affidavits, and where a Peer is examined, as a Witneſs on Interrogatories, or *viva Voce*, he muſt be upon his Oath. 1 *Williams*, 147.

The Caſe is the ſame as to Peereſſes. *Sed Quær.* if Peers, *&c.* have this Privilege, when they are ſued in *auter droit*, as Executor, Adminiſtrator, Guardian, or Truſtee.

How a Woman, who is a Peereſs by Marriage, is to aſſert her Privilege, if ſhe be afterwards charged as married to a Commoner.

If a Peereſs, by Marriage, is charged by the Plaintiff's Bill, to have afterwards intermarried with a Commoner, and therefore required to anſwer upon Oath, and that ſhe apprehends the Anſwering upon Oath may be a Prejudice to her, before ſhe puts in her Anſwer upon Honour, ſhe ſhould apply to the Court in a ſpecial Manner, for Liberty to do ſo, and the Court will determine the Queſtion according to the Nature and Merits of the Caſe; or elſe, ſhe ſhould plead her Privilege; but in this Caſe,

Caſe, it is thought, ſhe muſt aſſert her firſt Marriage to a Peer, by which ſhe had Privilege, unleſs it be admitted by the Bill, and deny her Marriage to a Commoner, to ſupport the Plea; for where Perſons ſo inſiſt upon privilege, they muſt ſhew their Privilege. See the Caſe of Lord *Howth* againſt Lady *Howth* in Chancery, *Michaelmas* and *Hillary* Terms, 1753, and 1754.

And note, there is a difference as to Peers and Peereſſes, in aſſerting their Privileges; Peers do it by Matter of Record, Peereſſes by Matter in *Pais*, or *parol* Proof. Ibidem.

If a Peer of the Realm anſwers falſly upon Honour, he cannot be indicted for Perjury on the Statute 28th *Eliz. Ch.* 1, for the Indictment muſt directly ſhew, that the Defendant was ſworn upon the Holy Evangeliſts, *&c.*. *Hawk.* 249, but he may be indicted for a Miſdemeanour. See Letter *Miſſive*. A Peer who anſwers falſly, upon Honour, cannot be indicted for Perjury, and why.

Privilege of the Officers, &c. *and Suitors in the Court.*

PRIVILEGE belongs to all the Officers, Attornies, and Miniſters of the Court; and if any Perſon intitled to Privilege, be arreſted by Proceſs of any other Attornies and other Officers privileged.

And exempt from ſerving on Juries, or in any Office which may diſturb them in their Profeſſion.

Court, he may bring his Writ of Privilege, containing a *Superſedeas*: And all Officers, Attornies, *&c.* intitled thereto, are exempt from ſerving upon Juries, in Offices, or in any Capacity that may in the leaſt diſturb or moleſt them in their Profeſſion; but it is very neceſſary that ſuch Perſon, ſo intitled to Privilege, ſhould have a Writ of Privilege, ready to produce at all Times, upon Occaſion.

Privilege of Attornies extends not to their Servants.

But Privilege extends only to ſuch Attornies, *&c.* who have an immediate Dependance on the Court, and it does not extend to their Servants or Dependants.

An Attorney on the Roll, tho' he doth not practice hath Privilege.

But an Attorney, tho' he doth not practice, yet he ſhall have his Privilege ſo long as he continues an Attorney on Record.

Serjeants at Law or Barriſters have no privilege.

A Serjeant at Law has no Privilege, nor a Barriſter.

An Attorney uſing a Trade, to be put out of the Roll.

An Attorney, uſing any Trade, ſhall be obliged either to leave off his Trade, or be put out of the Roll.

A Bailiff committed for refuſing to diſcharge an Officer of the Court, who had produced his Writ of Privilege.

An Officer of this Court being arreſted, produced his Writ of Privilege, which the Bailiff refuſed, and obliged him to put in Bail before he would diſcharge him. Lord *Egerton* committed

ted the Bailiff to the *Fleet*, for the Contempt. 2 *Har. Chanc. Pract.* 3d Edit. 320.

Privilege how to be pleaded.

Privilege is not to be pleaded in the Negative; as that an Officer ought not to be ſued elſewhere but in his own Court, without ſaying it is uſual for them to be ſued there, *&c.* and it ſhould not be pleaded too general. 2 *Har. Ch. Pract.* 3d Edit. 320.

Attornies, *&c.* to be ſued in their own Court only.

The Officers and Attornies, *&c.* of the Court, have alſo this Privilege, that they are not to be ſued in any Court, but in that Court only to which they belong (except they be ſued by an Attorney, *&c.* of another Court in his Court) if they be, they may plead their Privilege, and it ſhall be allowed. *Sed Quær.* if there be another Defendant in the Cauſe not privileged. See 1 *Vern.* 246.

Quær. if there be another Defendant not privileged.

Plea of Privilege to be upon Oath.

The Defendant being Foreign Appoſer in the *Exchequer*, pleaded the Privilege of that Court, and that he ought not to be ſued or impleaded elſewhere; but the Court over-ruled the Plea, becauſe it was not put in upon Oath. 2 *Vern.* 83.

RULE. Attachment of Privilege not to iſſue till Bill filed.

By the 79th general Rule, Attachments of Privilege at the Suit of Officers, Attornies, or any other privile-

ged Perſon, grounded upon *Engliſh* Bills, are not to iſſue until the Bill be firſt filed.

Except to quiet Poſſeſſions, ſtay Waſtes, or Suits at Law.

But if the Bill be for an Injunction to quiet Poſſeſſions, ſtay Waſtes, or Suits at Law commenced, ſuch Attachment or other Proceſs for Appearance may iſſue before the Bill be filed; notwithſtanding the above Rule, how to proceed, if the Bill be not filed in Time, after ſuch Proceſs hath iſſued, ſee the Proceedings on the *Subpæna*, under Title, *Proceſs*.

Subpæna not to be prayed in a Bill againſt an Attorney, but an Order to anſwer, unleſs ſued in *auter droit*.

Where an Attorney is Defendant to a Bill, a *Subpæna* is not to be prayed in the Bill againſt him, but an Order for him to anſwer the Plaintiff's Bill in the uſual Time, unleſs he is ſued as Executor, Adminiſtrator, Guardian, or Truſtee; for his Privilege is perſonal, and not to be applied, but as he is an Attorney of the Court. See Title, *Attorney* and *Sollicitor*.

Suitors and Witneſſes attending the Court, if arreſted, ſhall be diſcharged.

All Suitors and Witneſſes attending on the Courts of Juſtice are privileged; and if during that Time they are arreſted, either in the Face of the Court, or out of the Court, as they are going or coming to attend and follow the Cauſes, on which they ſo attend, (for ſo far the Court does and will protect every Man) the Court, on application of

of Counſel, will enlarge them, and will grant a temporary *Superſedeas* of Privilege; and the Plaintiff in the Action, upon Complaint and Oath made thereof, ſhall, unleſs he makes it appear, he was ignorant of the Attendance the Defendant was bound to, ſtand committed, and remain in Cuſtody, until he petitions, ſubmits and begs pardon of the Court, and pays the Coſts to the other Party. 2 *Lill* 371. *Goldſ.* 33. *Bulſt.* 85. 1 *Har. Chanc. Pract.* 3d Edit. 319. But in ſuch Caſes, the beſt way is to apply to the Court for a Writ of Protection, for ſome certain Time, which the Court will grant on a proper Affidavit, and on Counſel's Motion; and when it has iſſued, it will be proper to ſhew the ſame, and give Copies thereof to all Sheriffs, *&c.* to whom it is likely any Proceſs may be directed againſt the Party. See *my Practice of the Law Side of the Court*, p. 18.

Writ of Protection.

A Defendant, coming to execute a Commiſſion, and being arreſted, had an *Habeas Corpus cum Cauſa*, and was ſet at Liberty. 1 *Ch. Pract.* 3d Edit. 319.

Defendant arreſted, in coming up to execute a Commiſſion, ſet at Liberty. *Quær.*

A Plaintiff arreſted when he came up to examine his Witneſſes, was diſcharged by *Superſedeas* of Privilege: And a Plaintiff coming up to Court to proſecute his Cauſe, half a Year after his Bill exhibited, was arreſted, and had his

And alſo a Plaintiff, who had come up to examine his Witneſſes. *Quær.*

his Privilege; it appearing he came up only for that Purpoſe. *Ibidem. Sed Quær.* For it does not appear that the Practice has been ever carried ſo far in this Kingdom.

Proceſs.

Proceſs what.

PROCESS (*Proceſſus a procedendo ab Initio uſque ad finem*) is ſo called, becauſe it proceeds or goes out upon former Matter, either original or judicial, and hath two Significations. Firſt, it is (largely) taken for all the Proceedings in any Action, real or perſonal, civil or criminal, from the Beginning to the End. Secondly, we call that Proceſs, by which a Man is called into any temporal Court, becauſe it is the Beginning or principal Part thereof, by which the reſt is directed; or if taken ſtrictly, it is the Proceeding after the Original before Judgment. *Briton*, 138. *Lamb. Lib.* 4. *Cr.* 133. 8 *Report* 157.

Subpœna the 1ſt, Proceſs, to call the Defendant in to anſwer, and is made out by the Attornies.

The *Subpœna* is the firſt Proceſs of this Court, in order to bring in the Party to Anſwer: And it is the only Writ on this Side of the Court, which the Attornies themſelves make out, but no other Writ in this Court; and it iſſues under the Seal of this Court, requiring the Perſon complained of in the Bill, ſometimes

ſometimes immediately, and at other Times at a certain Day, to appear in the ſaid Court, on pain of 100 *l.* to anſwer the Matters objected againſt him, by the Perſon complaining of him in the Bill, who is generally called Plaintiff.

It was antiently and originally a Proceſs in the Courts of Common Law, in order to bring in a Witneſs to atteſt the Truth; and it is a Summons to the Party, under a Penalty, to appear and give his Teſtimony.

Originally a Proceſs at Common Law to bring a Witneſs to atteſt the Truth.

This Proceſs therefore was taken up by the Court of *Chancery*, when a Man was convened to anſwer upon Oath as to the Truth of the Plaintiff's Allegations; becauſe it was the neareſt Proceſs that was uſed in the Caſe of Atteſtation by the Common Law; and this was formed after the Manner of Citations by the Civil and Canon Law, in which it was neceſſary to inſert the Name of the Defendant, and alſo of the Plaintiff, at whoſe Suit they were to appear, and the Time and Place for Appearance.

And was formed by the Court of *Chancery*, after the Manner of Citations, at the Civil and Canon Law.

And this Writ in *Chancery* was firſt framed by *John de Waltham*, Keeper of the *Rolls*, and afterwards Biſhop of *Saliſbury*, and Lord Treaſurer of *England*: It took its Name from the Words inſerted therein, to denote the Penalty for Non-performance, *viz. Sub Pœna centum Librarum*;

Subpœna, why ſo called, and when firſt framed.

Librarum; which Words are inſerted *In Terrorem*, the Penalty being never levied.

Common to, and prayed on all Bills, except poſſeſſory Bills.

And it is common to, and prayed by all the before-mentioned Bills, and is made Uſe of on every one of them, but on the poſſeſſory Bill; which Bill is proceeded upon on the Appearance on Service of the Injunction, and on perſonal Interrogatories, as is before ſet forth.

Four Defendants only to be in a *Subpœna*.

You can put but four Defendants in one *Subpœna*, and the Reaſon is to prevent the Vexations of Plaintiffs, and to prevent the Miſtakes which might happen in the Tranſcribing a Multiplicity of Names; but a Huſband and Wife are taken together but as one of the four.

RULE.

How to be teſted and made returnable.

By the 2d general Rule, every *Subpœna* is to be teſted, and made returnable in Term-time, or in the four Days after *Eaſter* Term, or in the eight Days after every other Term.

The Return of the *Subpœna* twofold.

And the Return of the *Subpœna* is either ordinary, or extraordinary.

1ſt Ordinary, which is returnable at any Day certain in Term.

1ſt, Ordinary, which is at any Day certain within the Term; for in this Court, by the foregoing Rule, no *Subpœna* is to be returnable in the Vacation.

2dly,

2dly, The Extraordinary Return is made *immediate*; but in this Caſe the *Subpœna* muſt iſſue in Term-time, or in the four Days after *Eaſter* Term, or the eight Days after any other Term; and no Service of ſuch *Subpœna* returnable *immediate*, ſhall be good, unleſs it be in *Dublin*, or within twelve Miles thereof. See p. 734. And note, the Defendant has the ſame Time to appear to a *Subpœna* returnable immediately, as to the *Subpœna* returnable on a certain Day,—that is, four Days after Service.

2dly, Extraordinary, which is returnable immediate.

In the Caſe of *M'Carthy* and *Kelly*, in this Court, a *Subpœna* was teſted on a *Dies non*, and ſolemnly determined by Lord Chief Baron *Dalton*, that it was regular to do ſo; and he was of Opinion, that a *Subpœna* may be teſted and made returnable at any Time in Term, or in the four or eight Days after any Term.

Subpœna teſted on a *Dies non*, held good.

By the 6th General Rule, all *Subpœnas* are to be ſigned by the Attornies, and entered at the Chief Remembrancer's Office, and at the Seal, otherwiſe, upon Certificate of no ſuch Signing, or Entry, the Defendant to be diſmiſſed with Coſts.

RULE. To be ſigned by the Attorney, and entered at the Chief Remembrancer's Office, and at the Seal Office, or Defendant to be diſmiſſed.

And note, that there may be ſeveral Miſtakes in the *Subpœna*, which may vitiate the Writ.

What Miſtakes in the Writ will vitiate the Writ.

Firſt,

1ſt, In the Names of the Parties.

Firſt, in the Names of the Parties; for if there be Error in the Name, either Chriſtian Name or Surname, there, if another Perſon, ſo named, be ſerved, he ſhall have his Coſts: And, that this was ſo at the Canon Law, ſee *Gail*, 93, *Durand*, 177.——But if the Perſon falſely named be ſerved, and do not appear, there can be no Proceſs of Contempt againſt him; becauſe no Perſon was cited; *et non Entis nullæ ſint Qualitates*; and therefore, if an Attachment iſſues upon ſuch *Subpœna*, upon Application to the Court, it ſhall be diſcharged with Coſts. ——So alſo, at the Canon Law, if the Perſon ſo ſerved appeared, and went away without anſwering, there could be no Proceſs againſt him, becauſe the Citation is the Foundation of the Cauſe, and the Libel a Specification of the Citation, and the Proceſs muſt run upon the Citation, and a Citation againſt *Peter* could found no Contempt or Contumacy againſt *John*: But in Courts of Equity, where the *Subpœna* is but as a Summons, if the Defendant appears by his proper Name, and that he be properly named in the Bill, this cures any Error in the *Subpœna*, or the Service thereof; and Proceſs may be entered upon this Appearance, for Want of an Anſwer, though he was improperly named in the *Subpœna*. *Maranta*, 240.

Secondly,

Secondly, in the Return, as if it be taken out in Term returnable at no Day, or Time certain; for the Party is at a Loſs when to appear, and, therefore, there is no Contempt in not obeying it.

2dly, In the Return.

Thirdly, in the Form of the Writ; for if the Form of the Writ be miſtaken, it cannot be preſumed, even in the Court to which it is returnable, that it iſſued from thence; and therefore, the Party ſerved, ſhall not be obliged to take Notice of it.

3dly, In the Form of the Writ.

But where there are many Plaintiffs, they need not all be named, but only *A. B.* and others, ſince this is ſufficient Notice to the Defendant to appear; for the Appearance to *A. B.* and others, will be an Appearance to the reſt; but the ſafeſt Way is to name all the Plaintiffs.

Where many Plaintiffs, ſufficient to mention *A. B. et al.*

By the 7th General Rule *, if the Bill be not filed before or at the Day of the Return of the *Subpœna* to anſwer, then the Defendant may enter his Appearance; and upon producing (at leaſt four

RULE. The Proceedings in Caſes where the *Subpœna* iſſues before the Bill is filed, if the Bill be not filed in the Time preſcribed by the Rule.

* This Rule relates only to Bills for Injunctions to quiet Poſſeſſions, ſtay Waſte, or Suits at Law; in all other Caſes, the Bill muſt be filed before the *Subpœna* iſſues, by Statute 6 *Ann. Ch.* 10. *Poſt.*

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four Days after ſuch Appearance) a Certificate thereof, and of no Bill being filed, he ſhall, upon Motion, be diſmiſſed with Coſts; but if no ſuch Motion be made, then the Plaintiff ſhall have Liberty to file his Bill at any Time in the ſaid Term, or within ten Days after the ſaid Term; but if the Bill be not filed in that Time, no Proceſs of Contempt to iſſue on the ſaid Service.

If not filed in the Time, no Proceſs of Contempt to iſſue on the Service of that *Subpœna*.

So that if the Bill be not filed within the Time preſcribed by the Rule, after Service of the *Subpœna*, no Proceſs of Contempt ſhall iſſue on ſuch Service, but the Plaintiff muſt ſerve the Defendant a-new with Proceſs for Appearance; and notwithſtanding the *Subpœna* be ſerved before the Bill be filed, yet the Defendant is not obliged to appear until the Bill be filed, and after it is filed, he ſhall have the uſual Time to appear and anſwer, as in Caſes of *Subpœna*, ſerved after the Bill is filed.

Defendant is not obliged to appear until four Days after the Bill is filed.

RULE. The Time Plaintiff has to file his Bill, on Service of *Subpœna*, returnable immediately, and ſuch *Subpœna* to be ſerved within 12 Miles of *Dublin*.

By the 5th general Rule, as to *Subpœna* returnable immediately, if the Plaintiff does not file his Bill, within four Days after Appearance, then, upon Motion to be diſmiſſed, without any further Day; and no Service of *Subpœna* returnable immediately ſhall be good, unleſs it be in *Dublin*, or within twelve Miles thereof.

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Time for filing the Bill enlarged, on ſpecial Cauſe ſhewn.

The Court do ſometimes, on Motion of the Plaintiff's Attorney, enlarge the Time for filing the Bill; but as theſe Bills are often contrived merely to delay ſome Proceedings at Law, the Court is very unwilling to grant further Time, unleſs ſome ſpecial Cauſe be ſhewn.

No *Subpœna* to iſſue till Bill filed, except in Caſes of Bills for Injunctions.

Nor until a certificate, that the Bill is filed.

But now, by Statute 6th *Ann*, *Ch.* 10. *pars*, no *Subpœna*, or other Proceſs for Appearance, ſhall iſſue out of any Court of Equity, until after the Bill is filed with the proper Officer, (except in Caſes of Bills for Injunctions, to quiet Poſſeſſion, to ſtay Waſte, or Suits at Law, commenced)* and a Certificate thereof, brought to the proper Officer, who makes out *Subpœnas*, or other Proceſs, under the Hand of the Officer who files Bills in Equity; for which Certificate he ſhall have no Fee.

The Certificate indorſed on the *Subpœna*.

In this Court, the Officer who files the Bill, enters on the Back of the *Subpœna*, that the Bill is filed.

Time of filing Bill, to be mark'd on the *Subpœna*, if above a Year before.

If the Bill be filed above a Year before the *Subpœna* iſſues, the Officer is to mark, at the Foot of the *Subpœna*, the

* A *Subpœna* for an Injunction to ſtop Proceedings at Law, may iſſue notwithſtanding there be not any Suit at Law commenced, at the Time the *Subpœna* iſſued, as to ſtop an Execution, *&c.*

Time the Bill was filed, for the Eaſe of the Defendant in finding the ſame.

They only are Defendants to a Bill, againſt whom Proceſs is prayed.

They only are Defendants to a Bill, againſt whom Proceſs is prayed. 1 *Williams*, 598.

RULE.

Subpœna how to be ſerved in all Caſes.

By the 1ſt general Rule, every *Subpœna* is to be ſerved perſonally, or a Copy thereof (after ſhewing the ſaid Writ) left at the Defendant's uſual Place of Reſidence, with one of the Family, to be given to the Defendant, unleſs it be for Payment of Money, in which Caſe, perſonal Service is requiſite. But where the Defendant is out of the Land, and cannot be found, and yet proſecutes a Suit at Law, or in this Court; for Relief againſt which ſuit at Law, a Bill is exhibited, upon Affidavit made that he is out of the Land, and cannot be found, the Court will order the *Subpœna* to be left with his Attorney at Law, or in this Court, as the Caſe requires, and that to be good Service.

How if it be for payment of money; and the Defendant out of the Kingdom.

Defendant to be ſerved with a true Copy, or no Contempt not to appear.

But note, it muſt be a true Copy with which the Defendant is ſerved, or he may take Advantage of it, for it is not Contempt in the Party, not to appear, if he be not ſerved with the *Subpœna* itſelf, or a true Copy.

Perſons employed to ſerve *Subpœnas*, to be literate.

In Lord Chief Baron *Hale*'s Time, it was ordered, that the Perſons to be employed in ſerving *Subpœnas*, and other Pro-

Proceſs, ſhould be literate Perſons, and capable of reading the Proceſs they ſerved.

Service of the *Subpœna* on the return Day good.

In the Caſe of *Higginbotham* againſt *Cheevers* in this Court, the Service of a *Subpœna* on a return Day, even in the Afternoon, was ruled by Lord Chief Baron *Gilbert*, good, becauſe it is not certain how long the Court ſits.

How the *Subpœna* is to be ſerved if the Defendant be but a Lodger in the Houſe.

If the Defendant be but an Inmate or Lodger in a Houſe, the *Subpœna* is to be ſerved either perſonally any where, or upon the Defendant's own Servant, or his Wife, or Child, above the Age of Sixteen Years, at the Lodgings, or upon the Landlord or Landlady of the Houſe; but Service upon the Servant of the Landlord or Landlady, will not be good.

Proceſs ſerved at Defendant's laſt Place of abode, Defendant having left it above twelve Months, not good.

But leaving a *Subpœna* to appear and anſwer, at the Lodgings of a Defendant, who was not to be found, not good Service, though an Order was obtained for that purpoſe, it appearing afterwards that the Defendant had left his Lodgings above a Year before the *Subpœna* was ſerved. 2 *Vern.* 369.

A Service on either Huſband or Wife, a good Service of both.

If the *Subpœna* be againſt Huſband and Wife, and either the Huſband or Wife alone be ſerved, it is good Service of the other, becauſe they are conſidered as the ſame Perſon, and their Proper-

ty is the ſame; and therefore if one only be ſerved, it is preſumed to be ſufficient Notice to the other; and, for want of an Appearance for the Wife, an Attachment will iſſue againſt the Wife, or both, in as much as it is a Contempt in both, if the Wife doth not appear as well as the Huſband, ſince the Huſband ought to take Care to order an Appearance for his Wife.

A *Subpœna* ſerved on one in *England*, ordered to be good Service of another Perſon beyond Sea, and why.

If two Perſons commence a Suit beyond Sea, to arreſt the Defendant's goods at *Leghorn*, by Order of Court, the Service of the *Subpœna*, on the Defendant here, may be Service on the other Defendant beyond Sea. *Love* and *Baker*. 1 *Ch. Ca.* 67; for both joining in the ſuit beyond Sea, are looked on, in the Cauſe, as but one Perſon; and, by conſequence, they are to be looked on here but as one Perſon, they being in this Matter the ſame in Intereſt.

When the Service is good at Night, or on a *Sunday*.

The Service is good in the Night, or on Sunday, if it be before the Time of the Return; for this being only Proceſs of Notice, and not to arreſt the Party, it can create no Diſturbance, though it be ſerved in the Night, or on *Sunday*. 1 *Har. Chancery Pract.* 299. 3d *Edit.*

A Perſon who reſides in the Country, is found in Town, and ſerved with a *Subpœna*, he

If a Man, whoſe Place of Reſidence is in the Country, be found in Town, and there, be ſerved with a *Subpœna*, he is only intitled to ſuch Time to anſwer as a Perſon

Perſon who reſides in Town is, and not intitled to a *Dedimus* to anſwer in the Country; nor will the Court grant it, unleſs upon ſome ſpecial Cauſe by Affidavit, becauſe the Time for anſwering depends upon the Place where the *Subpœna* was ſerved; for no Man can gain, to himſelf, a new Privilege, by his change of Habitation, after the *Subpœna* ſerved.

has only the uſual Time to anſwer, unleſs on ſpecial Cauſe ſhewn.

By the 11th general Rule, where a Bill is brought to be relieved againſt a Suit at Law, upon Affidavit filed, that the Defendant is abſent beyond Seas, an Order may be taken out of courſe, for allowing the Service of the Attorney at Law, or in this Court, to be good Service; and the Attorney is to be ſerved with the Order: In which Caſe, he ſhall have, for his Client, four Days to appear, and four Days to anſwer, before any Proceſs of Contempt do iſſue.

RULE. Service of Defendant's Attorney at Law, or in this Court with *Subpœna*, good Service, where Defendant is out of Kingdom, and he is alſo to be ſerved with the Order.

Where it has appeared to the Court, that the Defendant was a neceſſary Party, and that he was in foreign Parts, or out of the Kingdom, and abſconded, ſo that it was very difficult, or almoſt impoſſible to have him ſerved with Proceſs, the Court have, in many Caſes, gone great Lengths to compel the Defendant to appear for the Expedition of of Juſtice. See 1 *Williams*, 523.

If the Defendant be a neceſſary Party, and is ont of the Kingdom, or abſconds to avoid Service, the Court will go great lengths to compel the Defendant to appear.

Service of Defendant's Wife's Houſe, or Place of abode ordered as good Service.

In the Caſe of *Card* againſt *Brown*, and others, in this Court, 28th *April* 1730, it was ordered, that Service of one of the Defendant's Wife's Houſe, or Place of Abode, with *Subpœna* to anſwer, and other Proceſs, ſhould be good Service of the Huſband, it appearing, by Affidavit, that he was out of the Kingdom, and a neceſſary Party, and that his Wife abſconded to avoid Service.

Service on a Perſons who had a Bond of the Defendant in his Hands.

And in the Caſe of *Humphry* againſt *Newſtead*, and others, 9th *May* 1730, it was ordered, that Service of *James Fleming*, who had a Bond in his Hands belonging to the Defendant *William Newſtead*, and was to receive the Money for him, and of *Charleton* and *Scot*, two Attornies, with a *Subpœna* to anſwer, ſhould be deemed good Service of the Defendants, *Thomas* and *William Newſtead*, they being out of the Kingdom and abſconding; it appearing that the ſaid *Charleton* and *Scot* were Attornies for the ſaid *Thomas* and *William Newſtead* in other Cauſes commenced againſt them; the ſaid *Fleming*, *Charleton*, and *Scot*, being ſerved with Notice of the Motion, as appeared by Affidavit.

Where a Plain- by his own Bill, or by Affidavit appears to be beyond Seas, Service of his Attorney in Court ſhall be good Service.

If it be neceſſary to bring a Croſs Bill againſt a Plaintiff, who, upon the Face of his own Bill, appears to live abroad, beyond Seas, the Service of his Attorney, in Court, with a *Subpœna*, ſhall be order-

ordered to be good Service, without the uſual Affidavit; becauſe, it appears, by his own Bill, that he is out of the Reach of the Proceſs of the Court: And where it does not appear, by the Plaintiff's Bill, that he is beyond Seas, on Affidavit thereof, the like Order ſhall be made.

No Proceſs to be ſerved on a Priſoner committed at the Suit of the Crown, without Leave.

No Proceſs can be ſerved on a Priſoner, committed at the Suit of the Crown, without Leave, but if he once appears, you may go on againſt him. See *Moſeley's Rep.* 237, where it is ſaid, that Lord Chancellor, as one of the Commiſſioners of Oyer and Terminer, gave Leave to ſerve a Perſon with a *Subpœna*, who was in Confinement in *Newgate* for Murder, of which he was indicted at the *Old Baily*, and a ſpecial Verdict found.

Proceedings againſt Attornies on filing Bills againſt them.

Where an Attorney is Defendant to a Bill, a *Subpœna* is not to be prayed in the Bill againſt him, but an Order for him to anſwer the Plaintiff's Bill in the uſual Time, unleſs he is ſued as Executor, Adminiſtrator, Guardian, or Truſtee.

The Attorney General not to be ſerved with *Subpœna*.

The King's Attorney General is not to be ſerved with *Subpœna*, upon any Bill being filed againſt him. See *Title Bill.*

Subpœnas may be ſerved within a Liberty.

Subpœnas may be as well ſerved within Liberties, as without.

On Affidavit of an Injury done to the Party ſerving the Proceſs, and on Motion, the Court will commit the Party offending.

If Injury be done to the Party, who ſerves the Proceſs, either in Word, or Deed, or the Authority of the Court contemned, upon Affidavit, and on Counſel's Motion thereon, an Attachment to the Purſuivant ſhall iſſue againſt the Party guilty of the Contempt, for it is againſt the Dignity of the Court to ſuffer ſuch Contempt; and the rather, becauſe the Proceſs is executed by private Perſons, and not by a publick Officer; for no private Man would ſerve the Proceſs, if it were not to be vindicated, for Obloquy, Abuſe, or Contempt.

Proceſs on Bills for Foreclosure of Morgages, how to ſerved on Perſons abſconding or out of the Kingdom.

By 7 *Geo.* 2 *Ch.* 14, it is enacted, that upon all Bills of Foreclosure filed, or to be filed, in the Courts of *Chancery*, or *Exchequer*, where it ſhall appear to the Court, by Affidavit, that any of the Parties, neceſſary to be ſerved, for carrying on the Suit, do abſcond, or are out of the Kingdom, ſo as they cannot be ſerved with Proceſs, to appear and anſwer, but have been in the Kingdom within twelve Kalendar Months next preceding ſuch Affidavit, the Courts may order that Service of the Tenants of the mortgaged Premiſſes, or the known Agent, or Receiver of the Rents and Profits, and at the laſt Place of Abode of

of the Perſon ſo abſconding, or being out of the Kingdom, ſhall be good Service.

And note, the Motion in this Caſe, is to be made by the Plaintiff's Attorney; and the Court do not require a Certificate of the Bill being filed, as it is uſually ſo ſet forth in the Affidavit on which the Application is founded. Ibidem.

Subpœna to elect an Attorney.

IF a Cauſe hath ſlept twelve Months in Court, there ſhall be no Proceedings had upon it, without firſt ſerving a *Subpœna ad faciendum Attornatum*. 1 *Vern.* 172. *Subpœna ad Faciendum Attornatum* where a Cauſe has ſlept twelve Months.

And the Reaſon of the *Subpœna ad faciendum Attornatum* in this Caſe, is, becauſe the Defendant might be dead in ſo long a Time, and therefore, the Court do not think the firſt Appearance of the Defendant, by his Attorney, to be ſufficient to found any further Acts or Proceedings of the Court upon; and therefore, there muſt be a ſecond Appearance for the Defendant, and then it is preſumed that he is living. The Reaſon, of it.

Alſo,

And where the Defendant's Attorney is dead, a *Subpœna ad*, &c. muſt iſſue.

Alſo, if the Party's Attorney in Court be dead, no Proceſs can be taken out againſt the Party, until he has appointed a new Attorney in Court; and a *Subpœna ad faciendum Attornatum* muſt be taken out for that Purpoſe, and ſerved; becauſe, till then, the Party is not in Court. 1 *Williams*, 420, *Ratcliff* againſt *Raper*.

RULE. The Proceedings thereon, where the Defendant's Attorney is living, and when he is dead.

But a Rule was made in this Court, the 27th *June*, 1709, that in all Caſes, where a Party is ſerved with a *Subpœna ad faciendum Attornatum*, and the former Attorney is living, there the Rule is for liberty to proceed, upon producing an Affidavit of the Service of the *Subpœna ad faciendum Attornatum*; but in Caſe the Attorney is dead, then the Plaintiff is to proſecute the Defendant to enforce him to make an Attorney in the Cauſe; and when the Defendant has appeared, you may proceed of courſe, without any Motion or Rule for Liberty to proceed.

On an appearance, the Plaintiff may proceed of courſe.

Service of this Writ good, if left at the Defendant's Houſe.

It was allowed, that the Service of the *Subpœna ad faciendum Attornatum*, would be good, if left at the Houſe; and though the Party in this Caſe, denied himſelf, yet ſtill the *Subpœna* might be left at his Houſe. 1 *Williams*, 420.

Subpœna

Subpæna to hear Judgment.

Subpæna to hear Judgment.

WHEN a Day is appointed by the Court for hearing of the Cauſe, the Party, at whoſe Inſtance the Cauſe is ſet down, may then iſſue a *Subpæna ad audiendum Judicium.*

RULE.
How to be ſerved.

By the 65th general Rule, every *Subpæna*, to hear Judgment, is to be ſerved perſonally, or left * at the Party's uſual Place of Reſidence, eight Days at leaſt before the Return thereof, except by the Conſent of the Attornies on both ſides, a ſhorter Time be agreed upon, or appointed by ſpecial Order of Court. And where it ſhall appear by Affidavit, that the Party to be ſerved, hath no Place of Reſidence, or is beyond the Seas, then the *Subpæna* left with his Attorney in Court will be good Service. †

An Affidavit of the Service thereof, to be produced on the Hearing.

It is neceſſary to have an Affidavit of the Service of the *Subpæna, to hear Judgment* made and filed, and to have an atteſted

* It would ſeem from the Words of this Part of the Rule, as if the Original was to be left at the Place of reſidence. But this *Subpæna* is ſerved by delivering the Copy in the ſame manner with the *Subpæna* to appear and anſwer.

† But there muſt be an Order for this Purpoſe, which the Court on ſuch Affidavit, and an Attorney's Motion thereon will make.

teſted Copy thereof ready to produce at the Hearing, ſo that Service may be proved, if the Party ſerved ſhould not appear; if this Affidavit be not filed, the Court may refuſe to give Judgment.

And this *Subpœna* is according to the Notion of the Civil Law.

And this Citation is made according to the Notion of the Civil Law, that no Act of the Court may be made *Parte inaudita altera*; and the Service is made eight Days before the Hearing, that the Party may have Time to take out his Depoſitions and prepare his Counſel.

In what Caſes it need not be ſerved.

And it is to be ſerved upon all Hearings, except upon Hearings upon the Officer's Report, and the Merits, where an Account has been decreed; or upon the Verdict and Merits, where an Iſſue has been directed to be tried at Law, or upon Re-hearing, or Hearings upon Bills of Review and Reverſal; or upon Sequeſtrations, where the Bill is to be taken as confeſſed; in theſe Caſes it is ſufficient to ſerve the Order for Hearing.

Where an Infant is Defendant, the Affidavit of Service of *Subpœna* to hear Judgment muſt be on the Guardian, not on the Infant.

Where an Infant is Defendant, the Affidavit of Service of the *Subpœna* to hear Judgment muſt be, that the Guardian was ſerved, not the Infant; aud this, (as it ſeems) though the Infant be above Fourteen, or want ever ſo little of Twenty-one; and the Serving the Infant

Infant is not good, for *non conſtat*, but the Infant might be in his Cradle; or ſhould it appear, by the Bill, that he is near Twenty-one, yet being not able to defend himſelf, the Service muſt be on the Perſon, appointed by the Court, to defend him. 2 *Williams*, 643.

If a Cauſe is adjourned over, for Want of Parties, and the Defendant is ſerved with the Order, yet he muſt be ſerved with a *Subpœna to hear Judgment*. *Moſeley's Rep.* 226.

Cauſe adjourned for Want of Parties, Defendant muſt be ſerved with *Subpœna* to hear Judgment.

Proceſs of Contempt.

PROCESS of Contempt iſſue, either by Virtue of the ordinary ſtated Rules, or by Virtue of ſome extraordinary Rule founded upon the Parties Conſent, on obtaining ſome Favour from the Court.

Proceſs of Contempt upon the ordinary and extraordinary Rules.

As to the firſt, they are either for not appearing, for not anſwering, or not anſwering over, or for not taking out a *Dedimus*, or not returning an Anſwer in due Time, after the Return of the *Dedimus*.

As to the ſecond ſort of Proceſs. Under this Head it is proper to conſider the Nature and Extent of the Rules for Time to anſwer, or Proceſs *tunc pro nunc*, as alſo

alſo the Rules for anſwering, or Proceſs from the Beginning.

To conſider alſo, where a Plaintiff ſhall begin his Proceſs, and how far he ſhall proceed with them on the Foot of theſe Rules, and when he muſt go on in the ordinary Courſe.

To conſider alſo in what Senſe, and for what Purpoſe, a ſhort Anſwer is to be looked upon as no Anſwer with regard to Proceſs.

As to the Rule of Proceſs, *tunc pro nunc.*

Proceſs *tunc pro nunc*, the Meaning thereof.

The Meaning of that is, the Defendant being obliged to anſwer by the ſtated Rule in four Days after Appearance, his Counſel or Attorney prays, that that Rule may be diſpenſed with, or relaxed, and that he may have further Time to anſwer, and offers to the Court, as an Inducement, that in Caſe he ſhould fail to anſwer by the Time that ſhall be given him, that the Plaintiff ſhall be as forward with his Proceſs, as if no ſuch Rule had been obtained by the Defendant, to prevent the Plaintiff from proceeding with his Attachments, according to the ſtated Rules; that is, that the Plaintiff ſhall be in as good a Condition, as he would have been, if no Indulgence had been given to the Defendant.

As

As to the Rule of Proceſs from the Beginning; by the former Rule it was intended, that the Plaintiff ſhould be in as good Condition as he would have been in, had the Defendant not been indulged; but when the Rule for Proceſs from the Beginning is granted, it is intended he ſhall be in a better Condition, and that will be done thus:

Proceſs from the Beginning in two Caſes.

Suppoſe the Defendant's Time for anſwering, hath been long out, and the Plaintiff hath neglected, or omitted to enter his Proceſs.

First, where Defendant's Time for anſwering is long out, and Plaintiff omits entering Proceſs.

Or ſuppoſe the Defendant hath anſwered ſhort ſeveral Times.

Secondly, where Defendant anſwers ſhort ſeveral Times.

Now, upon this Rule, if the Defendant fails to anſwer, the Plaintiff ſhall enter his Proceſs back, and take out, at once, all his Proceſs, not from the Time of the Rule given, but from the Time the Defendant ſhould have firſt anſwered.

In either Caſe, how Plaintiff is to enter and teſt the Proceſs.

And it is proper to be conſidered, where the Plaintiff ſhall begin his Proceſs, and how far he ſhall carry them on.

Ibidem.

As to the Queſtion, where he ſhall begin, when the Rule is, to give Proceſs from the Beginning.

Ibidem.

He

Ibidem. He ſhall teſt his Proceſs, where Defendant made the firſt Default, as is before mentioned.

Proceſs *tunc pro nunc*, how to be conſidered. As to the Rule for Proceſs *tunc pro nunc*, it muſt be conſidered what State the Defendant was in, when this Rule was obtained.

If Defendant's Time for anſwering be out. If his Time for anſwering was out, then the Plaintiff may teſt his Proceſs on the Day of the Rule.

If his Time for anſwering be not out. If his Time for anſwering was not out, then the Proceſs muſt not be teſted, till the Attachment would have been due by the ordinary Rules; for it is only intended by the Rule for Proceſs *tunc pro nunc*, that he ſhould be in as good a Condition as he would have been in, and not in a better.

Now as to how far he ſhall proceed, on the Foot of the extraordinary Rules, and then go on, on the ordinary Rules.

It is frequent for Plaintiffs after the Time given by the extraordinary Rule is out, to let another Term, or a Part of a Term paſs, and then they have taken out Proceſs, not only to the Time that was given, but to the Time that lapſed afterwards, to the Day of entering their Proceſs; but that hath been judged irregular

gular, and that for this plain Reaſon, the Proceſs cannot be taken out *per Saltum*, and all at once, but by virtue of the Conſent or extraordinary Rule; and the Conſent is only, that the Plaintiff ſhall *tunc*, that is, when the Time fixed for anſwering ſhall be out, take out Proceſs; but what Proceſs? only ſuch as would have been due in the ordinary Courſe, if no ſuch Order had been, and then he ought to have gone in the ordinary Manner, for the Conſent imports no more, nor can it be extended further.

Time given to anſwer, and Defendant anſwers ſhort, Proceſs may iſſue, as if no Anſwer.

As to ſhort Anſwers, if Time is given or Proceſs, and the Defendant anſwers ſhort, it is deemed as no Anſwer, and therefore the Proceſs may iſſue as if no Anſwer was filed.

On Report of an inſufficient Anſwer, Plaintiff to go on with Proceſs.

It often happens, that a Defendant in Contempt, is at liberty to pay his Coſt, and hath Leave to anſwer, and if he ſhould anſwer ſhort, the Plaintiff may proceed with his Proceſs, from the former Proceſs, as if the Anſwer had not been put in; and not be obliged to begin *de novo*, unleſs he hath accepted of the Coſt, which Lord Chief Baron *Gilbert* called a Commutation, and the following Caſe ſeems to confirm our Practice.

Unleſs he hath accepted the Coſt.

Ibidem.

A Diſtinction was taken by the Solicitor General, and agreed to by the Court as reaſonable, and agreeable to

the Meaning and Orders of the Court; that if any Proceſs of Contempt have gone out againſt a Defendant, for want of his Anſwer, that on Tender of the Coſts of thoſe Contempts, if the Plaintiff accepts them, and the Anſwer upon looking into it appears to be inſufficient, ſo that the Plaintiff takes Exceptions, and the Defendant is obliged to put in a further Anſwer, that in order to compel the Defendant to put in ſuch further Anſwer (if not put in Time) the Plaintiff muſt begin all Proceſs *de novo*, and go on with it regularly; becauſe his Acceptance of the Coſts, was a Remiſſion of all former Contempts, and purged them; but as an inſufficient Anſwer is really no Anſwer at all in the Judgment of the Court, if he refuſes to accept the Coſts, and the Anſwer being put in, and Exceptions taken to it, if it is reported inſufficient, he may go on with the Proceſs where he left off, to compel putting in a further Anſwer, without beginning *de novo*, as in the other Caſe. *Haiſtwell* and *Grainger*, 1 *Ch. Ca.* 238. *Bac. Equ. Ca.* 351, 352. 2 *Williams, Rep.* 482.

Note, here it is proper to conſider, how far he ſhall go on; will the Time taken up in Exceptions, and referring them, and confirming the Report be conſidered?

And

And the uſual Proceſs of Contempt are as follows,

1ſt *Attachment.*

2d *Alias Attachment.*

3d *Pluries Attachment.*

4th *Proclamation.*

5th *Commiſſion of Rebellion.*

6th *Serjeant at Arms.*

7th *Sequeſtration.*

1ſt Attachment, and on what grounded.

The *Subpœna* is a Summons to the Party himſelf, that is Defendant, wherefore, not to appear thereon, is acounted a Contempt of the Court; and in ſuch Caſe an Attachment iſſues to the Sheriff to take him up: In this, the *Chancery* or Equity Proceſs differs from the Proceſs at Common Law, for there, the Writ or common Capias, which is in the Nature of a Summons, is directed to the Sheriff, and the Sheriff antiently made his Return upon it, either *ſummoneri feci*, or *nihil habuit in Balliva mea per quod, ſummoneri poſſit*; here the Plaintiff makes Affidavit of the Service of the *Subpœna*, and files it in the proper Office, and then the Attachment iſſues of courſe, becauſe the Summons is in Nature of on Order to attend the extraordinary Juriſdiction, and all other Proceſs iſſue

on a Suppoſition of Diſobedience thereunto; but if the Summons had iſſued to the Sheriff, it had only been a Contempt ſhewn to a Miniſterial Officer in not paying Obedience to him, and not to the Court itſelf: Beſides, at Common Law, if a Writ were directed to the Party himſelf, that might have been ſmothered, and it would not have laid any Foundation for any other Court to proceed upon it: But when the Power of the Juſticiar was broke, this gave the *Chancery* a Power to iſſue Writs, and the other Courts Authority to proceed upon them, and therefore theſe were neceſſarily directed to the Sheriff, that they might be returned to the other Courts; but in the *Chancery* and *Exchequer*, where the ſame Court iſſued the Proceſs, where the Appearance was to be, the firſt Proceſs was directed to the Party, that it might be left with him, or at leaſt a Copy of it, to make the Party more aſcertained of the Time of his Appearance. *M. S. Treatiſe of the Original of the Court of Chancery*, by the late Lord Chief Baron *Gilbert*.

RULE. Attachment for not appearing, or for not anſwering.

By the 9th general Rule, no Attachment for not appearing on *Subpæna* is to iſſue out, but on Affidavit firſt made, and filed, of the Service of ſuch *Subpæna*; and if the Defendant doth not appear in four ſitting Days after the Bill filed, and Return of the *Subpæna*, and anſwer

ſwer within four ſitting Days, after ſuch Appearance, then, upon Failure of either, and not before, the Attachment to iſſue.

Attachment may be directed to the Sheriff of any County.

And in this Court, although the Defendant's Place of Abode be particularly mentioned in the Affidavit, of the Service of the *Subpœna*, yet the Proceſs may be directed to the Sheriff of any County; but in all Caſes, the Place where the *Subpœna* was ſerved, ſhould be particularly mentioned in the Affidavit of Service.

The uſual Return on the Attachment, by the Sheriff.

And upon this Attachment there are two Returns, either a *cepi Corpus*, or a *non eſt inventus*; but the firſt Return is ſeldom or never made, the Sheriff generally returning thereon, that the Defendant is not found in his Bailiwick; but as the Proceſs may be directed to any County, the Clerk who makes them out, is uſually impowered, by the Sheriff of ſome County, to return them.

The Form of the Attachment, and how the Sheriff is to diſpoſe of his Priſoner.

But in an Attachment, the Form of the Writ is, *ita quod habeas Corpus ad reſpondendum nobis tam de quodam, Contemptu per præfatum H: nobis illatum ut dicitur, quam ſuper bijs quæ ſibi tunc & ibm. objicientur, et ad faciendum et ulterius recipiendum quod dicta Curia noſtra conſideraverit in hac parte et hoc nullatenus omittas, et habeas ibi hoc breve*; by which Words it might ſeem they might

amerce the Sheriff for not bringing in the Body, as they did upon the *Capias* at Common Law; but becauſe the Writ was originally founded upon a Contempt, it ſeems that when the Sheriff has taken up the Body, he has paid Obedience to the Writ, though he does not actually bring him up to the Court; becauſe, the Contempt only induces a Commitment, which is ſatisfied, by Impriſonment in the County Gaol; and the Statute of *Weſtminſter* 2d only relates to original and judicial Writs, and not to theſe prerogative Proceſs, and therefore they iſſued an *Habeas Corpus*, which is an undoubted Writ, within the Statute upon which to found an Amerciament. *M. S. Treatiſe of the Original of the Court of Chancery*, by the late Lord Chief Baron *Gilbert*.

If the Sheriff returns a *cepi*, a *Hab. Corp.* is to iſſue.

So that if the Sheriff returns a *cepi Corpus* the next Step is to move for a *Habeas Corpus*, to bring up the Defendant's Body, if he will not anſwer below; for the Sheriff has executed the Command of the Writ of Attachment, by taking the Body, and he cannot carry him out of the County, without the Command of the King; and if he ſhould carry him out of the County without the King's Writ, it would be an Eſcape. *Ibidem.*

The running out of Proceſs to a Sequeſtration, on the Return of *non eſt inventus*.

If the Sheriff returns a *non eſt inventus* on the firſt Attachment (which is generally

generally the Caſe) and the Defendant ſtill ſtands out, the Plaintiff may then iſſue an *alias* Attachment, and upon the like Return on the *alias* Attachment, a *pluries* may iſſue, and upon the like Return on the *pluries* Attachment, the Plaintiff may then iſſue a Proclamation, having firſt obtained an Order of the Court for that Purpoſe, which is entered of courſe in the Office, at the Inſtance of the Plaintiff's Attorney.

The Proclamat on a Proceſs iſſuing out of the extraordinary Juriſdiction.

And note, the Writ of Proclamation is a Proceſs, iſſuing out of the extraordinary Juriſdiction, upon a *non eſt inventus*, returned on the preceding Proceſs, commanding the Party to appear in the *Chancery*, *Subpœna Ligeanciæ*. Now where a *non eſt inventus* was returned on a *Capias*, iſſued in a criminal Matter, they proclaimed the Party, and if he did not come in on ſuch Proclamation, he was declared an Outlaw, ſo if he contemned the extraordinary Juriſdiction he was proclaimed; or if he was not taken, or did not come in upon ſuch Proclamation, then he was deemed a Rebel, and thereupon a Commiſſion of Rebellion iſſued. *Ibidem*, and *vide Dalton*, 379, 380.

The Sheriff upon Attachment, or Proclamation, cannot break open Doors, and why.

It hath been doubted, whether upon an Attachment, or Proclamation, the Sheriff may break the Doors or not; ſome have held that the Intent of the

Writ is to go no further than a common *Capias*, and that according to the Authority of *Semaine*'s Caſe, 5 *Coke* 91, it would be very inconvenient that the Sheriff's Officers, that execute common Proceſs, ſhould have, by this Writ, an Authority to break into a Man's Houſe, and that his Houſe ſhould not be a Protection to him; others have held that the Writ is *propter Contemptum nobis illatum*, and that therefore, being in the Queen's Caſe, there is no Privilege or Protection againſt the Queen's Proceſs; but the true Reaſon of this Doubt, both in *Dalton* and *Compton*, ariſes from the not underſtanding the true Nature of the Proceſs, and the true Reaſon of *Semaine*'s Caſe, for doubtleſs upon an Attachment, or Proclamation, the Sheriff cannot break the Doors; and the Difference as to this Matter is, that when there is only Authority in a Proceſs to take the Perſon, or levy the Debt, the Sheriff can go no further, becauſe the Writ gives him no further Authority; but in the Queen's Caſe, or in the Caſe of Outlawry, there are the Words *non omittas propter Libertatem aliquam*, and therefore ſuch Writ gives Authority to break the Houſe; beſides, that in the Caſe of Outlawry, no Man ſhall receive Protection from the Law, of which he is declared a Violator, and therefore the ſeizing him as an Outlaw, doth imply the Liberty of entering and ſeizing him whereſoever he lay

The Difference between Proceſs iſſued for Contempt, between Party and Party, and thoſe at the Suit of the Queen or Outlawry.

lay hid; but it may be aſked why in the common Caſe of a Contempt, the Proceſs was not ſo formed as to give Authority to Sheriffs to enter the Freehold; the Reaſon is,

Firſt, becauſe the very Notion of *liberum Tenementum* is, that the Tenement ſhould be freed by the Law, from all actual Violence, for that cannot be ſaid to be held freely, if the Lord that had Right to diſtrain, or the Sheriff that was to ſerve the ordinary Proceſs, had a Power to enter by Force, and if the Lord was not permitted to enter with actual Violence, where he had a Right to his Rent, the Sheriff could not be allowed to enter by Force, to ſerve the ordinary Proceſs. Reaſons why on a Contempt, the Sheriff can't break open Doors, or enter Freeholds.

Secondly, becauſe in the Time when the Tenures were in their full Height, it was thought too ſevere, that the Lords that had generally Demands on their Tenants, ſhould break in upon their Tenants, ſince the Violence of ſuch a Proceſs in the firſt Inſtance, might compel them to pay more than was due. Ibidem.

Thirdly, becauſe the Party might be ready and willing to anſwer the Demand, and therefore it is too ſevere to extort that by Violence, which it doth not appear but that the Party is ready to pay. Ibidem.

Fourthly,

Ibidem.

Fourthly, The whole Proceſs of a whole County muſt be ſerved by the Sheriff, but the Law muſt, in a Caſe of this Kind, take Notice, that it could not be ſerved but in proper Perſon; and it were too much, to lodge ſuch diſcretionary Power in the Deputy of a Miniſter, to violate Mens Houſes, in Execution of Proceſs, in the firſt Inſtance. See the aforeſaid *M. S. Treatiſe, of the Original of the Court of Chancery.*

And note, that the Liberty of a Man's own Houſe ſeems to be a Matter very much contended for, from the Conqueſt till the ſettling of *Magna Charta*; for the Conqueror carried his Endeavours to reſtrain Men from the Freedoms they had been uſed to in their own Houſes, as may be ſeen in *Selden*'s *Janus*, 55. 65. And therefore, in the Time of *Henry* the 3d, under the Protection that the Law gave to Houſes and Caſtles, they uſed to ſhelter unlawful Diſtreſſes, which were therefore Inconveniencies provided againſt by the Statute of *Marlbridge* and *Weſtminſter*. 1, 2. *Ibidem.* And ſee 2d *Inſt.* 139. 193. And *Selden*'s *Janus*, 155. 165.

If the Sheriff refuſes or neglects to return the Proceſs, he may be fined.

If the Sheriff refuſes, or neglects, to return any of the foregoing Proceſs of Contempt, the Plaintiff's Attorney may proceed to fine him; and after a ſecond Fine, the Court, upon Motion of the Plaintiff's

Plaintiff's Attorney, will grant an Attachment to the Purſuivant againſt the Sheriff; but if the Sheriff hath taken the Defendant's Body, a *Habeas Corpus* muſt iſſue to bring him in, for the Reaſons beforementioned.

And an Attachment to the Purſuivant may be iſſued againſt him.

The next Proceſs is a Commiſſion of Rebellion; and this is a particular Commiſſion, directed to Commiſſioners, generally four private Perſons, *Conjunctim & Diviſim*, commanding that *A. B. ubicunq. invent. foret infra Regnum Hiberniæ, tanquam Rebellem et Legis noſtræ Contemptorem Attachiatis ſeu Attachiari faciatis ita*, &c. *Tot.* 37.

The Commiſſion of Rebellion.

By the 18th general Rule, Commiſſions of Rebellion and Attachments to the Serjeant at Arms, iſſue of courſe, the Proclamation being firſt returned, and filed in the Office, and the Orders for the ſame duly taken out; and if the Party will ſtand out to a Commiſſion, or Serjeant at Arms, his Anſwer is not to be accepted, till he firſt enters into Recognizance with Security, to perform the Decree of the Court, if the other Party deſires the ſame. *

RULE. Commiſſion of Rebellion and Serjeant at Arms, how they iſſue.

And Defendant to give Security to perform the Decree, if required.

The

* A Defendant in Equity is not originally obliged to give Security to abide the Decree, it is the Contempt only that ſubjects him to this Obligation. But it is ſaid, that Heirs, Executors, Adminiſtrators and Truſtees, are (as ſuch) excepted out of this Rule.

The Rule for the Commiſſion of Rebellion is entered of courſe at the Inſtance of the Plaintiff's Attorney.

How the Plaintiff is to proceed, if the Defendant after a Commiſſion of Rebellion appears, or anſwers, without giving Security, or paying the Coſt of the Proceſs.

If a Defendant ſtands out, the Proceſs of Contempt, either for not appearing, or not anſwering to a Commiſſion of Rebellion, and afterwards enters an Appearance, or puts in his Anſwer (as the Caſe is) without giving Security, and paying the Coſt of the Proceſs, the Courſe is, for the Plaintiff's Attorney to put a Rule on the Defendant, to give Security to abide the Decree of the Court, and to pay the Coſts of the Proceſs in four Days after Service of the Order for that Purpoſe, or that the Plaintiff may be at Liberty to proceed notwithſtanding the Appearance ſo entered, or Anſwer filed. And when the ſaid four Days are expired, then, upon an Affidavit of the Service of the ſaid Order, a Certificate of the Commiſſion of Rebellion being obtained, and of no Recognizance entered into, and on Motion of the Plaintiff's Attorney thereon, the Court will make the ſaid Order abſolute.

Defendant to give Notice of his Appearance, and tender the Coſt of the Proceſs, or Plaintiff may proceed.

In the Caſe of *Gibbons* againſt *Leary* in this Court, *Trin.* 1757, the Defendant having ſtood out the Proceſs of Contempt, to a Proclamation of Rebellion, entered an Appearance; but not having given any Notice thereof to the

the Plaintiff's Attorney, nor tendered the Coſt of the Proceſs, the Plaintiff's Attorney entered a Commiſſion of Rebellion, and then obtained ſuch Order as aforeſaid, for Liberty to go on with Proceſs, notwithſtanding the Appearance: Afterwards a Motion was made by Counſel, on Behalf of the Defendant, to ſet aſide the laſt Order, as the Commiſſion of Rebellion was entered after the Defendant had appeared; but as the Defendant had not given the Plaintiff any Notice of the Appearance, nor tendered the Coſt before the Commiſſion was entered, the Court on ſolemn Debate, would make no Rule.

Quær. Would not the Caſe be the ſame, were the Proceſs for Want of an Anſwer.

Where the Demand is on the Eſtate, the Court will not compel the Defendant to enter into Recognizance, tho' he ſtands out the Proceſs to a Commiſſion of Rebellion.

Although the Rule in this Court be, that where a Defendant ſtands out the Proceſs of Contempt to a Commiſſion of Rebellion, he ſhall (if required by the Plaintiff) give Security to abide the Decree of the Court; yet, if the Demand be not perſonal, but a Demand on the Eſtate, the Rule ſhall be diſpenſed with. It was ſo determined on full Debate, in the Caſe of *Darcy* againſt *Darcy* and *Darcy*, in this Court, *Trinity* Term, 1757, notwithſtanding the Plaintiff had before obtained

tained ſuch Order for Liberty to proceed on Default of the Defendant, in giving Security to abide the Decree, and paying the Coſt of the Proceſs as aforeſaid, and had alſo obtained a Sequeſtration, and an Order for ſetting down the Cauſe to be heard thereon, to have the Bill taken againſt the Defendant as confeſſed.

The Commiſſioners may break open Doors, to execute the Commiſſion of Rebellion.

On this Writ it is held, that the Commiſſioners may break open the Houſe of the Party, or of another, where he is to take him, becauſe the Words of the Writ are, that they ſhould attach the Party, *Tanquam Rebellem et Legis noſtræ Contemptorem*, and therefore, this is within the Proceſs of Outlawry; for where you are to take the Party as a Contemnor of the Law, the Deſign of the Writ is, that he ſhould not be any where protected by the Law, and therefore, it implies an Authority to enter into the Houſe. *Dalton* 253, *Compton*, 33, 47. 2 *Prax. Alm.* 61. 5. 60. 92.

The Reaſon why this Writ is directed to Commiſſioners and not to the Sheriff.

And this is indeed the Reaſon why this Proceſs is directed to Commiſſioners, and not to the Sheriff, becauſe the Sheriff cannot be ſuppoſed to execute all ſuch Proceſs in Perſon; and it may be inconvenient to truſt ſo great a Power with a Deputy of a Sheriff's Nomination, and therefore this Court appoints its own Commiſſioners, who are entruſted to do every Thing very carefully, and are anſwerable

ſwerable to the Court for their Miſcarriages.

What Aſſiſtance the Commiſſioners may demand and have, and how they are to proceed, if their Priſoner be reſcued.

The Commiſſioners have Power by their Commiſſion to call to their Aſſiſtance any Perſon, or Peace-Officer to aſſiſt them in taking the Defendant; and by the Writ, the Sheriff is bound to aſſiſt them, but not to take their Priſoner from them; and if any Perſon ſhall reſcue him, the Court will order the Reſcuer to ſtand committed. 1 *Har. Ch. Pract.* 325. 3d Edit. *Pract. Regr.* in *Chancery*, 95.

Commiſſioners of Rebellion, if to be paid, and how to act when the Proceſs iſſues before, and when it iſſues after a Decree.

On Commiſſions of Rebellion, the Commiſſioners are not intitled to any certain fixed Fee, but ſhall be paid for their Trouble as they deſerve; they can take Bail for the Defendant's Appearance * unleſs this Proceſs iſſues after a Decree, in which Caſe they muſt bring up their Priſoner, and have him committed to the *Four-Court Marſhalſea*, which the Court will do on an Attorney's Motion, where he is to remain until he has paid the Money, or performed

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* After a Decree, the Practice now is, upon a *non eſt inventus*, being returned upon an *Attachment*, to iſſue a *Serjeant at Arms*. See title *Decree*, &c. And in any Caſe whether *before*, or *after* a Decree, the *Commiſſion of Rebellion* is ſeldom executed; if it be before a Decree, on a *non eſt inventus* thereon, an *Attachment to the Serjeant at Arms*, iſſues, and upon the like Return by him thereon a *Sequeſtration*.

formed the Decree, and cleared his Contempt, and the Court will order him then to be diſcharged. But note, the Juſtices of the Peace cannot bail the Defendant, although it is an Offence againſt the publick Peace. *Pract. Regr.* in *Chan.* 95. 2 *Ch. Rep.* 262.

A Juſtice of Peace cannot Bail the Defendant.

The Bail is uſually taken by the Commiſſioners in their own Names, with a Condition for the Defendant's Appearance, and the Defendant, upon his being admitted to Bail, ought to pay the Coſts of his Contempt. 1 *Har. Ch. Pract.* 325, and *Pract. Reg.* in *Ch.* 95.

And the Defendant is then to pay his Coſts.

If the Commiſſioners refuſe to return the Writ, the Court on Motion of the Plaintiff's Attorney, will order them to return it; which Order if upon Service they obey not, Proceſs of Contempt may iſſue againſt them. And if they take the Party, and ſuffer an Eſcape, the Court, on Affidavit and Motion, and a Day given to ſhew Cauſe to the contrary, will order them to be committed, till they bring him in, or pay the Debt and Coſt. 1 *Har. Ch. Pract.* 324. *Toth.* 38, 39.

How the Commiſſioners may be puniſhed if they return not the Writ, or let the Defendant eſcape.

When a Commiſſion of Rebellion has iſſued againſt the Defendant, he muſt, (as has been ſaid) enter into a Recognizance to perform the Decree, before his Anſwer ſhall be received. And for this Purpoſe, his Attorney is to move, that

The proceedings on entering into Security, upon a Commiſſion of Rebellion.

that it may be referred to a Baron, to meaſure the Security the Defendant is to give, and the Court will make an Order for that Purpoſe, and then, he is to take out a Summons from the Baron, to attend the Reference, and is to ſerve the Plaintiff's Attorney therewith, and alſo with a Copy of the Order of Reference, and to proceed thereon, as on other References: And when the Baron hath ſigned his Report, it is to be brought to the Chief Baron, and the Defendant is to enter into a Recognizance, in the Sum meaſured by the Baron, for performing the Decree.

If the Plaintiff fails to attend on the ſecond Summons, the Baron will proceed *Ex Parte*. Ibidem.

The Defendant is to procure two ſufficient Perſons to be Security for him, but the Defendant is not to execute the Recognizance, nor is he obliged to ſerve the oppoſite Party with the Names of the Sureties; however it will not be amiſs to ſerve them twenty-four Hours before the Hour, to be appointed for entering into the Recognizance. Ibidem.

The Chief Baron ſometimes requires the Sureties to ſwear themſelves worth double the Sum, meaſured for the Security, but this is only where the Sureties are not known, or where there is Ibidem.

any Doubt as to their Subſtance, or Circumſtances.

Ibidem. When the Recognizance is perfected, then the Chief Baron's Clerk is to ſign a Certificate thereof, and to deliver the ſame to the Defendant's Attorney; and upon his producing this, and a Receipt from the Plaintiff's Attorney, for the Coſt of the Proceſs, the Anſwer ſhall be received.

Ibidem. If after the Order of Reference hath been obtained, the Defendant's Attorney ſhall neglect or delay, to proceed thereon, the Plaintiff's Attorney may proceed to diſcharge the Order of Reference in like Manner, as upon a Reference of Exceptions to ſhort Anſwers.

Ibidem. Bail may be given before a Baron, on Circuit. If the Defendant would give Bail before a Baron on the Circuit, he is to apply to the Court, by his Counſel, for an Order for that Purpoſe, and the Court will grant it; but he is to give proper Notice of the Motion, to the Attorney for the oppoſite Party.

Serjeant at Arms.

An Attachment to the Serjeant at Arms, on return of a *non eſt inventus*, on a Commiſſion of Rebellion. THE next Proceſs, after a Commiſſion of Rebellion, is an Attachment or Writ directed to the Serjeant at Arms; and this is granted on a Return of a

non

non eſt inventus, upon a Commiſſion of Rebellion, upon Motion of the Plaintiff's Attorney; but the Rule is uſually entered of courſe in the Office. See the 18th general Rule, Pa. 761.

And the Serjeant at Arms is an antient Officer belonging to this Court; and he alſo attends the Houſe of Commons; and his Office there is to keep the Doors, and to execute ſuch Commands, touching the Apprehenſion and Taking into Cuſtody of any Offender, as the Houſe ſhall injoin him: He is alſo to attend the Perſon of the King, and to arreſt Perſons of Condition offending, and to give Attendance on the Lord High Steward, ſitting in Judgment on any Traitor. He is intitled to two Pounds ten Shillings Caption Fee, nine Pence a Mile travelling Charges, and ſix Shillings and eight Pence a Day for every Day his Priſoner is in his Cuſtody.

The Serjeant at Arms, an antient Officer; and his Buſineſs.

By an Order made in the *Chancery* of *England*, by the Earl of *Macclesfield*, the Plaintiff may move of courſe for a Serjeant at Arms, in all Caſes, on the return of a *cepi Corpus*. *Moſeley's Rep.* 305.

A Serjeant at Arms, in all Caſes, on a *cepi Corpus* returned.

Here it may be inquired, why there muſt be a Serjeant at Arms, after the Return of the Commiſſion of Rebellion, before

Why there muſt be a Serjeant at Arms after a Commiſſion of Rebellion, before

Sequeſtration can iſſue.

before a Sequeſtration can iſſue; and the Reaſon ſeems to be, becauſe Commiſſioners, for executing the Commiſſion of Rebellion, are of the Plaintiff's own Nomination, and the Court will not iſſue a Proceſs upon the whole Lands and Goods of the Defendant, until one of it's own Officers ſee that the Defendant do totally diſappear; and hence it is, that the Return of the Serjeant at Arms, is particularly recited in the Sequeſtration.

The Proceedings againſt the Serjeant at Arms for not returning his Proceſs.

If the Serjeant at Arms, refuſes or neglects to return this Proceſs, the Plaintiff's Attorney may proceed to fine him; and after a ſecond Fine, the Court, upon Motion of the Plaintiff's Attorney, will grant an Attachment to the Purſuivant againſt the Serjeant at Arms. If the Defendant be taken on this Writ, the Serjeant uſually takes Bonds for his Appearance, if not, the Defendant is to be committed to the *Marſhalſea*, of the *Four-Courts*: But Note, the Sheriff is not bound to take his Priſoner from him.

How he is to diſpoſe of his Priſoner.

The Sheriff not bound to take him.

Huſband and Wife may be taken by the Serjeant at Arms, but the Wife to be diſcharged on putting in her Anſwer.

On Proceſs of Contempt againſt *Baron* and *Feme*, the Wife may be taken into Cuſtody by the Serjeant at Arms; and he ſhall have Fees from the Huſband for both; but upon the Wife's putting in her Anſwer, ſhe ſhall be diſcharged, without

without being obliged to give Security to abide the Decree, as he muſt, if the Plaintiff ſhall require it.

No Diſcharge, or Conſent of either Plaintiff or Attorney, directed to the Serjeant at Arms, or Purſuivant, to be of any avail, unleſs their Fees be paid.

By two Orders, 18th and 22d *May*, 1713, upon reading the humble Petition of *Richard Povey*, Eſq; Serjeant at Arms of this Court, and *John Cameron*, Gent. Purſuivant of the ſaid Court, complaining that after Writs are delivered to them from the ſeveral Officers of this Court to them reſpectively directed, and that they, in Obedience thereto, ſend down, at their own Expence, Men and Horſes to execute the ſame, to their great Coſt and Charges; and that by reaſon of Notice given, or ſome other Means, the Perſons againſt whom ſuch Attachments iſſue, abſcond, or withdraw themſelves, ſo that they cannot be taken, and afterwards the Attornies of the ſaid Court diſcharge or ſuperſede the Serjeant at Arms, or Purſuivant to ſuch Attachment, but take no Care to ſee the Petitioners ſatisfied their reſpective due Fees, and Charges, that they were at as aforeſaid. It was therefore ordered by the Court, that whenever any Writ of Attachment ſhall iſſue reſpectively, to the Serjeant at Arms, or Purſuivant of this Court, and that in Obedience thereto, they reſpectively ſend down their Meſſengers to execute the ſame, that no Diſcharge or Conſent from any Attorney of this Court, or his Client, only, ſhall be of any avail, or hinder the

Execution of the ſaid Attachments, unleſs their reſpective Fees be firſt paid: And that no Perſon or Perſons, to be taken on any Attachment, ſhall be diſcharged from the Serjeant at Arms, or Purſuivant, until the ſaid Perſon, or Perſons do firſt produce to them a *Superſedeas*, under the Seal of this Court. And the reſpective Officers, of this Court, to iſſue no *Superſedeas*, to ſuch Attachments, without the Perſon, ſo ſuing for the ſame, do firſt pay off the ſaid Serjeant at Arms, and Purſuivant, their reſpective, uſual, and due Fees: And that until they are paid their reſpective Fees, the ſaid Serjeant at Arms, and Purſuivant, reſpectively, ſhall be at Liberty to renew the ſaid Attachment, notwithſtanding the Attornies to ſuch Contempts, ſhall not renew, or conſent to the Renewing the ſame.

Of Sequeſtrations.

Sequeſtration what, and when introduced.

THE next and laſt Proceſs is a Sequeſtration, which was firſt introduced in Lord *Bacon*'s Time, and then but ſparingly uſed in Proceſs, and after a Decree, to ſequeſter the Thing in Demand. 1 *Vern.* 421.

Of the Sequeſtration, and Sequeſtrators at the Civil Law.

This is a Proceſs in great Uſe in the Civil Law, as appears by *Domat*'s *Treatiſe*

tiſe of the Civil Law. Vol. 1. *Tit.* 7. of a *Depoſitum S.* 4. *pa.* 138, to 148. And Sequeſtrators are there ſaid to be appointed in two Caſes, either by the common Conſent of the Parties, when they all agree to it, or by the Judge, when the uncertainty of the Owner of the Thing controverted, and the Neceſſity of committing it to the Care and Keeping of ſome Body, oblige the Judge to order the Thing to be ſequeſtred pending the Suit. And this is there called a judicial Sequeſtration; which is different from that made by Conſent of Parties, this being a Covenant, the other a Regulation made by the Judge. For much curious Learning on this Proceſs, ſee the ſaid Author.

Proceſs of Sequeſtration twofold, meſne and judicial.

It is now become a common Proceſs, in our Courts of Equity, and may be ſaid to be twofold, that is, it iſſues either as meſne Proceſs on the Defendant's Default in not appearing, or not anſwering, after the whole Proceſs of Contempt have been ſpent againſt him; or it iſſues as a judicial Proceſs in Purſuance of a Decree, and to enforce the Performance of it; and it is the Execution and Life of a Court of Equity; and as it is the Fruit of a long Suit, it is to be favoured, and in this Caſe, it is ſaid to be analogous to an Execution at the Common Law. 1 *Williams* 308.

And firſt of the Sequeſtration on meſne Proceſs.

Sequeſtration on meſne Proceſs.

A Sequeſtration, on meſne Proceſs, is iſſued by Order of Court, on a Counſel's Motion, upon a *non eſt inventus* being returned upon the Attachment to the Serjeant at Arms; and it is generally directed to four or more Commiſſioners, impowering them to ſeize the Defendant's real and perſonal Eſtate into their Hands, and receive and ſequeſter the Rents and Profits of his real Eſtate, until the Defendant ſhall have anſwered the Plaintiff's Bill, or perform ſome other Matter which has been ordered by the Court, for not doing whereof he is in Contempt as aforeſaid.

How directed.

Sequeſtrators accountable and how they are to Act.

And theſe Commiſſioners are called Sequeſtrators, and are accountable to the Court, and are to act in the Execution of their Office, according to the Direction of the Court; and they are to make Return, from Time to Time, of what they have ſeized, as the Court directs, and are to account for what comes to their Hands, and to bring the Money into Court, as the Court ſhall direct, to be put out at Intereſt, or otherwiſe diſpoſed of, as ſhall be found neceſſary; but this Money is not uſually paid to the Plaintiff, but is to remain in Court till the Defendant

dant hath appeared, or anſwered, and cleared his Contempt; and then whatever hath been ſeized, by Virtue of the Sequeſtration, ſhall be accounted for, and paid him; however, the Court hath the whole under their Power, and may act therein agreeable to the Equity of the Caſe: And the Plaintiff's Counſel may move and obtain an Order for the Tenants to attorn, and pay their Rents to the Sequeſtrators; or for the Sequeſtrators to ſell and diſpoſe of the Goods of the Party, and keep the Money in their Hands, or bring it into Court, as the Court ſhall ſee fit.

Sequeſtration how to be executed, and the Proceedings in Caſe of Diſobedience.

How the Sequeſtration is to be executed, and the Proceedings to enforce it, in Caſe of Diſobedience, See Page 778.

Goods ſequeſtred, of a periſhable Nature, may be ſold by Order of Court.

Where Goods, that are of a periſhable Nature, are ſequeſtred on meſne Proceſs, the Court will, upon Application of Counſel, order the Sequeſtrators to ſell them; but without the Direction of the Court, they cannot even remove the Goods, much leſs ſell them, for the Goods are only to be retained, in Nature of a Pledge, to anſwer the Contempt. *Bunb. Rep.* 273.

Sequeſtrators on meſne Proceſs to retain only, ſo far as to ſatisfy the Contempt.

Sequeſtration, on meſne Proceſs, are accountable for the Profits; and can retain only ſo far, as to ſatisfy for the Contempt. 1 *Vern.* 248, and ſee *Bunb. Rep.*

Rep. 273, where it is ſaid that a Sequeſtration, for Want of an Appearance, is to be looked upon only as a *Diſtringas*, *ad Infinitum* at Law.

One Defendant proceeded againſt to a Sequeſtration, and not appearing, Plaintiff may proceed againſt the reſt.

This Proceſs is like an Outlawry at Common Law, ſo that if a Defendant, who cannot be found, is proceeded againſt, to a Sequeſtration, and does not then appear, you may proceed againſt the reſt. 2 *Ch. Ca.* 139.

Truſtees failing to appear, how to proceed againſt them.

If a Truſtee ſhould fail to appear, and Proceſs to a Sequeſtration ſhould iſſue againſt him, the Court ſhall proceed as if he had duly appeared, and put in his Anſwer. See the Act of Parliament among the Proceedings on Hearings upon Bills taken *pro Confeſſo*.

Sequeſtration againſt one Defendant and Cauſe heard againſt the other Defendants, yet he may come in and anſwer.

Where one of the Defendants is in Contempt to a Sequeſtration for Want of an Anſwer, and the Cauſe is heard againſt the other Defendants, yet the Defendant, who is in Contempt, may come in and anſwer, and the Cauſe may be heard again as to him. 2 *Vern.* 228.

Sequeſtration *niſi* againſt a Peer for Want of an Anſwer, and he puts in an inſufficient one, yet the Order for the Sequeſtration ſhall not be abſolute.

A Sequeſtration is the firſt Proceſs againſt a Peer, or Member of Parliament; but if there be an Order for a Sequeſtration *niſi* againſt a Peer for Want of an Anſwer, and he puts in an inſufficient one, yet the Order for the Sequeſtration ſhall not be made abſolute, but a new

a new Order for a Sequeſtration *niſi* ſhall be made. 2 *Williams*, 385.

A Sequeſtration may iſſue againſt an Infant for not appearing. 2 *Ch. Ca.* 163.

Sequeſtration may iſſue againſt an Infant.

And here let it be obſerved, that the ſeveral Proceſſes of *Subpœna*, *Attachment Alias* and *Pluries*, and the Writ of Proclamation do iſſue of courſe without Motion; becauſe the Clerks of the Office, when there is an Affidavit made of the Service of the *Subpœna*, do know whether there is an Appearance or not, and the Defendant not appearing, upon the Return of each Proceſs, is the Warrant for making out the other; but the laſt Prerogative Proceſſes are not to iſſue but by Order of Court; becauſe it muſt firſt appear to the Court, that the common Miniſters of Juſtice were not able to take the Party, before they ſhall have Recourſe to this extraordinary Method. For the Method of ſetting down Cauſes to be heard on Sequeſtrations, and Proceedings thereon, See *Title Hearing on Bills taken* pro Confeſſo.

What Proceſs iſſue without Motion, and what Proceſs are to iſſue by Order of Court.

Of Sequeſtrations on Decrees and the Proceedings thereon, with ſome Proceedings on Sequeſtrations in general.

A Decree for Land, generally executed by an Injunction to the Sheriff to put the Party in Poſſeſſion; a Decree for a perſonal Demand by a Sequeſtration, and the Proceedings to obtain ſuch Sequeſtration.

I Have before mentioned that there are two Sorts of Decrees, a Decree *in Perſonam*, and a Decree in *Rem*; and that the Decree in *Rem* is generally executed, by an Injunction to the Sheriff, to put the Party in Poſſeſſion of the Land, or other Thing demanded; that the Decree, *in Perſonam*, is executed by ſerving an atteſted Copy thereof, with an Injunction to the Party for the Performance thereof, *&c.* And that upon an Affidavit of the Service thereof, and of a Demand made of the Money, or other Thing decreed, and of having a proper Power to receive the ſame, and of Diſobedience, or Refuſal, the Court will grant an Attachment, and that upon a Return of *non eſt inventus* thereon, a Serjeant at Arms, and upon the like Return thereon, a Sequeſtration. See *Title Decree*, &c.

Writ how directed, and the Duty and Power of the Sequeſtrators.

And this Writ of Sequeſtration is uſually directed to four Perſons, who are named by the Party, to whom the Writ is awarded; and it is thereby commanded, that they, or any three or two of them, do at certain, proper, and convenient Times, go to, and enter upon, all the real Eſtate of the Defendant, and take, collect, and get into their Hands,

not

not only the Rents, and Profits of the ſaid real Eſtate, but alſo his Goods and Chattels, and perſonal Eſtate, and to detain, and keep the ſame under Sequeſtration, until the Defendant ſhall fully obey, fulfil, and perform the ſaid Decree, in every Particular, and clear his Contempts, and the Court make other Order to the contrary.

Sequeſtration, how to be ſerved, and the Proceedings.

The Sequeſtration being ſo directed to the Sequeſtrators, any two or more of them, therefore two of them at leaſt, muſt themſelves ſerve the Sequeſtration on the ſeveral Tenants, that is, one of the two muſt ſerve it in the Preſence of the other; they cannot make an Attorney for this Purpoſe, nor delegate their Power: And the Tenants alſo are to be ſerved perſonally; and this Service of the Sequeſtration, by the Sequeſtrators, on the Lands, is conſidered as a Seizing and Sequeſtring: Then, upon Affidavit of the Service of the Sequeſtration, and on Counſel's Motion thereon, an Order is to be obtained for paying the Rents to the Sequeſtrators; which Order is to be alſo perſonally ſerved. And it is ſaid, it muſt alſo be ſerved by two of the Sequeſtrators as aforeſaid; then an Affidavit of this Service is to be made, and a Motion, by Counſel, that the Tenants may pay their Rents to the Sequeſtrators, in a reaſonable Time, to be preſcribed by the Order, or ſhew Cauſe why he ſhould not be attached; and this

this Order, (it is ſaid) muſt alſo be ſerved by two of the Sequeſtrators, and a perſonal Demand made, and if the Rents be not paid, then, on Affidavit of ſuch Service, demand of Rent, and Non-payment, and Certificate of no Cauſe ſhewn, the Court, on Counſel's Motion, will grant an Attachment.*

Cauſe ſhewn againſt paying the Rent to the Sequeſtrators.

But where the Tenant can ſhew Cauſe againſt paying the Rent, as that there

* Theſe Difficulties attending the Execution of this Sequeſtration, are more than it may be poſſible to ſurmount; beſides the Delay and Trouble of two Orders entirely to the ſame Purpoſe: If the Sequeſtrators themſelves muſt not only ſerve the Sequeſtration, but every Order in the Cauſe, what Perſon, of any Credit, would be a Sequeſtrator? And if the Sum be large, what may be the Hazard in employing poor, or mean Perſons? Why may not the firſt Order, (if two Orders of the ſame Kind are to be ſerved) be ſerved by any common Perſon? or why need it be ſerved perſonally? When the Order, on which the Money is demanded, comes to be ſerved, it may be proper that two of the Sequeſtrators ſhould themſelves ſerve this, and that it ſhould be perſonally ſerved.—For the ſake of publick Dealings, Intercourſe, and Commerce, and of borrowing and lending, thoſe great Advantages in trading Nations, and without which they cannot poſſibly, for any Time exiſt, the Security of Money, and the Eaſe of getting it in, ſhould be the primary Conſideration of every Society, and of every Government, where there are Municipipal Laws for the Tranſaction of Property.—See the Caſe of *Widney* againſt *Donaldſon*, *Mich. Term*, 1753, *Kennedy* againſt *Fitzgerald*, *Hillary Term*, 1754, and *M'Nemara* againd *M'Nemara*, *Trinity Term*, 1760, all in this Court.

there is a prior Sequeſtration, *Cuſtodium*, or the like, there the Court allows the Cauſe.

Sequeſtrators cannot diſtrain Tenants may voluntary pay their Rents, or give Security.

But Sequeſtrators cannot diſtrain, if they do, they will be puniſhed by the Court; but if on Service of the Sequeſtration, the Tenant voluntarily, and without any Order, pays the Rent, or Part of it, or gives Security for it, this is good; ſo determined in the *Exchequer* in the Caſe of the Attorney General againſt *Wynne* and *Bingham*, 7th *May*, 1745.

Sequeſtration is for Lands and Goods where the Decree is for a perſonal Duty.

A Sequeſtration may be had of both Lands, and Goods, where the Thing decreed is a perſonal Duty. 1 *Ch. Ca.* 92.

Sequeſtration for Money in a third Perſon's Hands.

And it hath been ſometimes granted for Money of the Party, in the Hands of others. *Toth.* 173.

Great Truſt repoſed in Sequeſtrators.

Hence it appears, that there is a large Truſt repoſed in the Commiſſioners named in the Sequeſtration, and therefore great Care ought to be taken, that they be ſuch as are able to anſwer for what ſhall come to their Hands, in Caſe they ſhould be called to an Account.

RULE. Sequeſtrators to enter into Recognizance.

And therefore, a general Rule was made in the *Exchequer*, 5th *July*, 1743, that all Sequeſtrators, before the Act, do enter into a Recognizance, to be accountable

countable for all ſuch Sums as ſhall come to their Hands: But note, though this ſeems to be a very good Rule, it is not now adhered to.

This Rule not adhered to.

Their Duty.

They are not to diſpoſe of any Part of the Eſtate they have ſequeſtred, without Leave of the Court; and they are to behave themſelves, in all other Acts relating to their Office, as the Court ſhall direct.

How to proceed, if the Lands are in the Defendant's actual Poſſeſſion, and unſet to Tenants.

If the Lands, againſt which the Sequeſtration iſſues, be in the Hands of the Defendant, and not ſet to Tenants, upon Affidavit thereof, and on Counſel's Motion theron, the Court will make an Order for the Officer to ſet the Lands for a Year, from ſome certain Time, the Leſſee or Leſſees giving Security; and if the Tenants be diſturbed, the Court will attach the Offenders. See the aforeſaid Caſe of *Kennedy* againſt *Fitzgerald*, in this Court, *Hilary*, 1754. In *England*, the Practice is, upon ſuch Application, to grant an Injunction to put the Sequeſtrators into Poſſeſſion; and they to ſet and let; but this may be attended with ill Conſequences to the Sequeſtrators, as they would be accountble not only for what they made, but what they might have made, without wilful Default.

The Defendant, after been taken on an Attach-

Upon Affidavit that the Defendant was gone to *Holland*, to avoid the Plaintiff's

tiff's Demand, and he having before been arreſted, upon an Attachment, and a *Cepi Corpus* returned by the Sheriff, the Court upon Motion, granted a Serjeant at Arms againſt him, and upon the Return thereof, a Sequeſtration. 1 *Vern.* 334.

ment goes into foreign Parts, Court granted a Serjeant at Arms.

Where Lands of the Huſband, out of which, an Annuity to the Wife iſſued, were ſequeſtered, the Huſband dying the Sequeſtration was diſcharged, as to the Annuity. 1 *Ch. Rep.* 247.

Sequeſtration on Lands, out of which the Wife has an Annuity, diſcharged by the Death of the Huſband.

A voluntary and fraudulent Conveyance, to avoid an approaching Sequeſtration for a perſonal Duty, is no Bar to the Sequeſtration. 2 *Ch. Ca.* 46.

Conveyances to avoid a Sequeſtration for a perſonal Duty, void.

A Sequeſtration binds from the very Time of awarding the Commiſſion, and not only from the Time of executing it, and its being laid on by the Commiſſioners, for if that ſhould be admitted, then the inferior Officer would have *ligandi, et non ligandi Poteſtatem.* 1 *Vern.* 58.

Sequeſtration binds from the Time of awarding.

If the Goods ſequeſtered are not ſufficient to ſatisfy the Plaintiff his Demands, he may move by his Counſel to revive the Order for a Serjeant at Arms. See *Moſeley*'s *Rep.* 246. *Sed Quær.* if this be the Method? ſee *Bunb. Rep.* 62, where it is ſaid, the Sequeſtrators may be renewed at the firſt Inſtance,

Goods ſequeſtred not ſufficient, the Proceedings.

but that the former Sequeſtration muſt be firſt returned; and that until then the Court will not grant an Order for Sale of the Goods, which muſt be firſt obtained on Counſel's Motion, before the Goods can properly be ſold, and then a *Venditioni exponas* ſhall iſſue.

Account ordered on a firſt Sequeſtration, at the Inſtance of a Party who hath a ſecond.

If a Party obtains a Sequeſtration, on a Decree, and that a former Sequeſtration hath iſſued, and he apprehends the Sequeſtrators have received ſufficient to diſcharge the Demands, for which the former Sequeſtration iſſued, the Court, on Motion of the Attorney for the Party, who obtained the ſecond Sequeſtration, will order the Sequeſtrators in the former Sequeſtration to account before the Officer, though it iſſued in a Cauſe, between other Parties. So ordered in the Caſe of *Bouquier* and *Sandys*, in this Court, 12th of *July*, 1748.

Third Perſon having an Intereſt in the Thing ſequeſtered

If a third Perſon claims an Intereſt, in the Thing ſequeſtered, he muſt come in and be examined, *pro intereſſe ſuo*; but no Motion can be made for this Purpoſe, until the Sequeſtration be returned.

How Perſons who have a Title paramount to the Sequeſtration, are to proceed to be relieved.

Where Sequeſtrators ſeize the real Eſtate of the Party, any Perſon who claims Title to the Eſtate ſo ſequeſtered, either by Mortgage, or Judgment, Leaſe, or otherwiſe, or who hath Title paramount to the Sequeſtration, ſhall not be

be obliged to bring a Bill, to conteſt ſuch Title; but may move the Court as of courſe to be examined *pro intereſſe ſuo*; and in this Caſe, the Plaintiff is to exhibit Interrogatories in Order to examine him, and for a Diſcovery of his Title to the Eſtate, and he may be examined thereon accordingly; and the Parties may enter into Proof, touching the Title to the Eſtate in Queſtion; and if it ſhall appear that the Party who is examined *pro intereſſe ſuo*, hath a plain Title to the Eſtate, and is affected with the Sequeſtration, then it is to be diſcharged as againſt him, with or without Coſts, as the Court ſees fit, upon the Circumſtances of the Caſe. And there may happen other Circumſtances and Proceedings upon a Sequeſtration, which cannot fall within the general Rule here laid down, and which muſt be determined according to the Nature of the Caſe, and as it appears to the Court. 1 *Harriſon's Ch. Pract.* 3d Edit. 328.

Decree againſt a Peer, how to obtain a Sequeſtration.

If the Decree be againſt a Peer, or Lord of Parliament, after he hath been ſerved therewith, the Court, on Counſel's Motion, will Order, that he ſhall perform the ſame, in ſuch Time as they ſhall think proper, or that a Sequeſtration ſhall iſſue againſt him, by the Time the Proceſs to a Sequeſtration could iſſue, againſt a Perſon not intitled to Privilege.

The Party not anſwerable, for the Acts of the Sequeſtrators.

In the Caſe of Lady *Dacres* againſt *Chute*, 1 *Vern.* 160, the Sequeſtrators having by Virtue of an Order of the Court power to fell Timber, they fell Timber to the Value of ſeven thouſand Pounds, and pay over but two thouſand Pounds to the Plaintiff, for whoſe Benefit the Sequeſtration was taken out; the Lord Keeper would not charge the Plaintiff with more than the two thouſand Pounds, though the Defendant was an Infant, ſaying the Sequeſtrators were the Officers and Agents of the Court, and Men muſt take Care to pay their Debts, at their Peril.

Sequeſtration that iſſues as a meſne Proceſs, determines by the Death of the Party, but not if it iſſues after a Decree, tho' the Decree be for a perſonal Duty.

A Sequeſtration, that iſſues as a *meſne* Proceſs of the Court, will be diſcontinued, and determined by the Death of the Party; but where a Sequeſtration iſſues in Purſuance of a Decree, and to compel the Execution of it; there, though the ſame be for a perſonal Duty, it ſhall not be determined by the Death of the Party. 1 *Vern.* 58. *Sed Vide* 1 *Vern.* 118. 166, and 2 *Peere Williams*, 621, 622, where it is ſaid, that although ſuch Decree may be revived againſt an Executor, or Adminiſtrator, if there be a perſonal Fortune, yet if there be not a perſonal Fortune, the Lands, in the Hands of the Heir, ſhall not be affected by the Decree; nor ſhall

But Lands in the Hands of the Heir, not affected by ſuch Decree.

ſhall ſuch Sequeſtration bind the Feme, who came in for her Jointure, or Dower.

Nor ſhall it take Place of the Wife's Jointure.

But if the Decree were upon a Covenant, that bound the Heir, and the Defendant died, ſuch Decree might be revived by *Subpœna Scir. fac.* againſt the Heir, to ſhew Cauſe againſt the Decree, if the Decree be enrolled of Record; or if not, by Bill of Revivor, and when you have revived againſt the Heir and Executor, you may alſo revive the Sequeſtration, upon Motion, if upon coming into Court they can ſhew no Cauſe, why the Decree ſhould not be revived.

But a Decree on a Covenant which bound the Heir, may be revived againſt the Heir.

But it was reſolved, in Lord *Somers's* Time, that a Decree ſhould have the ſame Authority to bind the perſonal Aſſets, as a Judgment at Law; and therefore ſhall go *pari Paſſu*, to be paid off and diſcharged. But the Lien of the Judgment upon Lands, came in by the Statute, which only gives an *Elegit*, for a Moiety of the Land, in Satisfaction of the Debt; and therefore, that could give no Authority, to lay on a Sequeſtration, on the real Eſtate, for a meer perſonal Duty, where the Heir is not bound in the Covenant. See 1 *Vern.* 58. 118. 166.

But not otherwiſe.

No Order granted to renew, or diſcharge a Sequeſtration until returned.

And note, that the Court will not make any Order, to renew or diſcharge a Sequeſtration, in any Caſe, until it is returned; for the Sequeſtrators are anſwerable for what they receive, and they have Nothing to indemnify them, but the Authority given them by the Sequeſtration. *Bunb. Rep.* 31. 62.

Writ of Aſſiſtance granted for Sequeſtrators they having been oppoſed.

And Injunction if Poſſeſſion be with-held, or taken.

If Sequeſtrators ſhall be oppoſed in the Execution of their Office, the Court upon their Affidavit and Certificate thereof, will grant them a Writ of Aſſiſtance. *Bunb. Rep.* 168. If the Poſſeſſion be with-held, or taken from them, the Court, on Affidavit thereof, will grant an Injunction, to reſtore, or quiet them, as the Caſe is; ſo ordered in the Caſe of *Bridges* againſt *Carroll*, in this Court, 16th of *July*, 1731.

Sequeſtrators to be paid for their Trouble, and what.

In the Caſe of the Attorney General againſt *Carden* and others, on a Hearing, in this Court, *Trinity* Term 1760, a Queſtion aroſe, if Sequeſtrators are intitled to be paid for their Trouble. And Counſellor *Roberts*, whoſe Father had been Deputy Chief Remembrancer, for many Years, and who had himſelf acted in the ſame Office, for ſeveral Years, acquainted the Court, that his Father and he had always allowed the Sequeſtrators. That they are intitled to their Expences, ſeemed not to be queſtioned.

And to their Expences.

And

And *Domat* in his Civil Law, Vol. 1. *Tit.* 7, of a *Depoſitum*, *Sect.* 4. Pa. 147, ſays, that after the Controverſy is ended, the Sequeſtrator is obliged to account, to the Perſon who is adjudged to be Maſter, and to reſtore to him the Thing ſequeſtered, with the Fruits, if it produces any, he being paid his Sallary, and his Expences.

Intitled to their Sallary and Expence at the Civil Law, and were to account with the Perſon adjudged Owner, and to reſtore him the Thing ſequeſtered, *&c.*

From this Rule in the Civil Law, and really from the whole Tenor of the ſaid Title of a *Depoſitum*, Pa. 138, to 148, it would ſeem as if the Sequeſtrators were conſidered as Truſtees for the right Owner, of the Thing ſequeſtered. And in the aforeſaid Caſe of the Attorney General againſt *Carden* and others, it was a principal Point, and was moſt learnedly debated. But the Cauſe abated by the Death of one of the Parties, before the Court gave Judgment.

Sequeſtrators if Truſtees for the right Owner.

Some Rules concerning Proceſs of Contempt.

EVERY Proceſs of Contempt is to be teſted in Term Time, or in one of the ſitting Days after Term, and they muſt all be made returnable, on one of the Return Days in Term, except the Sequeſtration, which has no limited Time for its Return.

How to be teſted and made returnable.

Ibidem.

In Equity, there need not be one Day between the Teſt Day, and the Day on which the Proceſs is returnable, but Care muſt be taken, that each and every of the Proceſs be teſted on a Day, ſubſequent to the Day on which the next preceding Proceſs was returnable; for ſhould a ſubſequent Proceſs be teſted, on the Return Day of a former Proceſs, it is irregular.

Anſwer not deemed as filed, till the Coſts of the Contempt be paid.

No Anſwer ſhall be deemed to be filed, until the Contempt be purged; and until the ſame ſhall be ſo purged, the Plaintiff may proſecute the Contempt, notwithſtanding any Anſwer alledged to have been filed.

Coſts tendered and refuſed, may be lodged with the Officer.

If the Defendant tender the Coſt, and the Plaintiff refuſes to receive it, the Court, on Motion of the Defendant's Attorney, will give him Leave to lodge it with the Officer. See *Title Anſwer*.

Appearance entered, or Anſwer filed after the Time is expired, and Attachment the ſame Day, if Attachment ſhall hold.

Mr. Baron *Wainwright* was of Opinion, that though a Defendant ſhould, after the Time for appearing or anſwering was expired, enter an Appearance, or file an Anſwer, yet, if the Plaintiff had entered Proceſs, on the ſame Day, the Proceſs would be regular; for that the Defendant by not appearing, or anſwering, in the Time preſcribed him, by the Rules of the Court, ſhall be deemed

deemed in Contempt; and the Practice was ſo for ſome time, but it is now otherwiſe: And yet in *Bunb. Rep.* 251. 290, it is ſaid to be an eſtabliſhed Rule, in the *Exchequer* in *England*, and that in ſuch Caſe, the Defendant ſhall not have further Time to anſwer, without entering his Appearance with the Regiſter, as upon a Contempt.

It ſhall be good for an Injunction.

But in an Injunction Cauſe, the Attachment (it is ſaid) is ſo far good, as to warrant an Injunction thereon; and that the preſent Practice of this Court is ſo.

Defendant diſcharged on paying Contempts.

If the Defendant comes in, and appears, and purges his Contempt, (which is to pay the Coſt of all the Proceſs) he ſhall be diſcharged.

RULE.
Agreement to ſtop Proceſs, to be in Writing.

A Rule was made in this Court, in 1736, that no Agreement to ſtop Proceſs of Contempt ſhould be binding, ſo as to ſtop the Proceſs, unleſs ſuch Agreement be reduced into Writing, and ſigned.

Man and Wife in Contempt, Attorney to have Fees but as for one.

When a Man and his Wife are in Contempt, the Attorney is not to have Fees for both, for in this Caſe they are accounted but as one.

Proceſs cannot be revived, and if dead above a Year, an Order muſt be for Liberty to proceed.

Proceſs of Contempt as they are perſonal, abate abſolutely, by the Death of either Party, Plaintiff or Defendant; and

and cannot be revived. *Sed Quær.* if a Sequeſtration has iſſued on a Decree, as to a perſonal Eſtate? See Pa. 784. And if Proceſs lie dead above a Year, they cannot be proceeded on, without an Order for that Purpoſe, which the Court will grant on an Attorney's Motion.

Affidavit, if filed before the Return of the Attachment, the Arreſt is good.

If a Man is arreſted upon an Attachment, the Arreſt ſhall hold good, though no Affidavit be filed at the Time of taking forth the Attachment, if it be filed before the Return of it. 1 *Vern.* 172.

Defendant taken upon an Attachment, either on meſne Proceſs or after a Decree to be diſcharged on his Appearance.

If one be taken upon an Attachment, either in Proceſs or in Execution, after a Decree, yet in both Caſes, on his appearing before the Regiſter, he is to be diſcharged, and to anſwer the Interrogatories at large, not in Cuſtody; and if he be continued in Cuſtody, the Court, on Motion, and appearing before the Regiſter, will diſcharge him. *Hillary* 1700, between *Danby* and *Lawſon*. See *Bac. Equity Ca.* 351.

And on Certificate thereof, the Sheriff is to deliver up the Bond.

So, if the Sheriff takes one upon Attachment in Proceſs, he is to give a Bond of forty Pounds Penalty to the Sheriff, to appear and anſwer; but for one taken up in Execution, after a Decree, the Sheriff may inſiſt on Security, proportionable to his Duty; but in

in both Caſes, on the Regiſter's Certificate, that the Party has appeared, the Sheriff is to deliver up the Bond: Agreed to by the Regiſters, and ruled by the Maſter of the Rolls. *Hillary*, 1700, between *Danby* and *Lawſon*, *Bac. Eq. Ca.* 351.

Proceſs determined by the Demiſe of the King.

Upon a Motion for a Serjeant at Arms, on a Commiſſion of Rebellion returned, it was held, that by the King's Demiſe, every Proceſs of Contempt not executed, is determined, ſo that the Party muſt begin again at an Attachment; but where any Proceſs is executed, and a *cepi Corpus* returned, there the Proceſs ſtands good. 1 *Vern* 300.

But an Attachment was ſued out in the Time of King *Charles* the ſecond, and executed three Days after his Demiſe, but before Notice of his Death, and it was adjudged to be well executed, and the Proceedings thereon, regular. 1 *Vern.* 400. *Q.*

By an Order for Time to Anſwer, all Contempts are not ſtayed, unleſs it is ſo ordered.

If the Defendant is in Contempt for not anſwering; and on Motion he obtains Time to anſwer; if it be not expreſly ordered that all Contempts in the mean Time ſhall be ſtayed, the Plaintiff may go on, and proſecute the Defendant for not anſwering. 1 *Vern.* 104.

If

When the Proceſs is joint, any Defendant who is taken thereon, or comes in to Anſwer, muſt pay the whole Coſt, not moietively.

If joint Proceſs iſſue againſt ſeveral Defendants, and any one of them ſhall come in and anſwer, or is taken on the Proceſs, he ſhall pay the whole Coſts of the Proceſs; for in this Caſe they are not multiplied or increaſed, though there be ſeveral Defendants; and if the Proceſs had iſſued againſt the Defendants ſeparately, each Defendant muſt have paid the Coſts of the Proceſs againſt him, ſo that no Injury is done, but rather a Benefit; as the Defendants in the Caſe of joint Proceſs, may ſettle the Coſts among themſelves, and make each Man's Proportion very eaſy. It was ſo determined in the Caſe of *Brown* and *Blake* in this Court, *Hillary* Term, 1749.

The Coſt of the Contempt to be paid, before the Contemnor ſhall in any Caſe be heard.

And here it is to be obſerved, that the Contemnor, who is in Contempt, is never to be heard by Motion, or otherwiſe, until he hath cleared his Contempt, and paid the Coſts: As for example, if he comes to move for any Thing, or deſires any Favour of the Court. If the other Side ſays, or inſiſts he is in Contempt, though it is but to an Attachment for Want of an Anſwer, yet even in this Caſe he is not intitled to be heard, until he hath paid theCoſts of the Attachment (however ſmall they are) to the Party, or his Attorney, and he muſt produce a Receipt for them in open Court, before he

he can be heard; and this is always allowed as a good Cauſe, againſt hearing the Contemnor in any Caſe whatever.

The Court refuſed a Plaintiff in a croſs Cauſe, the uſual Order to refer the Exceptions to a ſhort Anſwer, not having paid the Coſt of Contempts, for not anſwering in the original Cauſe.

In the Caſe of *Kearny* againſt *Stewart*, and *e contra* in this Court, *Mich.* Term, 1749, the Court refuſed to grant the Plaintiff in the croſs Cauſe, the uſual Order to refer Exceptions to a ſhort Anſwer, as a Puniſhment for his Contumacy, he not having paid the Coſts of Proceſs of Contempt, which had iſſued againſt him to a Sequeſtration, before he had anſwered the original Bill, or entered into Security to abide the Decree; beſides the Court ſaid, it had the Appearance of a contrived Delay. And in all Caſes a Party comes but with a bad Grace before the Court, on any Application, who has contemned or diſobeyed their Rules or Orders.

For the Proceedings againſt Peers of the Realm, and other privileged Perſons, ſee *Letter Miſſive* and *privileged Perſons.*

Reference

Reference of the Regularity of Proceſs of Contempt to the Officer.

Reference of the regularity of Proceſs to the Officer.

IN running out the Proceſs of Contempt, the Plaintiff muſt be very careful in proceeding regularly; for if one of the Proceſs has iſſued irregularly, that Proceſs ſhall be ſet aſide, and alſo, all the ſubſequent Proceſs.

And the Proceedings.

If the Defendant apprehends, that any one of the Proceſs has iſſued irregularly, if the Proceſs be for Want of an Appearance, he is firſt to enter an Appearance, and then the Court, upon Motion of his Attorney, will order that the Regularity of the Proceſs be referred to the Officer, and thereupon, the Officer iſſues a Summons, by which he appoints all Perſons concerned, to meet him at the Chief Remembrancer's Office on a certain Day and Hour, named in the ſaid Summons, to proceed upon the Reference, and this Summons is to be ſerved twenty-four Hours at leaſt before the appointed Hour for attending before the Officer; and for this Summons the Defendant is to pay two Shillings and ſix Pence.

Summons to be ſerved.

And a Copy of this Summons is to be ſerved on the Plaintiff's Attorney; and if the Attornies on both Sides attend, then the Officer proceeds to examine

mine the Proceſs of Contempt; and if the Officer reports that the Proceſs have iſſued regularly, then the Defendant is not only to pay the Coſts of the Proceſs, but alſo the Coſts of the Reference and Report. The Officers Fee for the Report is ten Shillings.

If the Proceſs be reported regular, Defendant to pay Coſts.

If the Officer ſhall Report that all the Proceſs of Contempt have iſſued irregularly, then the whole ſet of Proceſs ſhall be ſet aſide, and the Plaintiff ſhall pay the Defendant the Coſts of the Reference and Report, to be taxed by the Officer.

Proofs irregularly iſſued.

See my Practice of the *Pleas Side of the Exchequer*, for further Proceedings on theſe References, which are much the ſame, with the Proceedings in this ſide of the Court in ſuch Caſes; but there is no ſettled Rule in the *Chancery* Side of the *Exchequer*, as to the number of Summonſes to be ſerved, it is diſcretionary in the Officer.

And for the method of confirming the Report, and how either Party, who thinks himſelf aggrieved, may apply to be relieved, ſee *Title References.*

Of

Of References, Reports, and Exceptions thereto.

Reference, what.

A REFERENCE is an Order of Court, whereby divers Matters, as Exceptions, Accounts, *&c.* are referred to the Baron, or to the Officer of the Court, to examine and make his Report thereon, to the End that the Court may make an Order abſolute, and determine ſuch Matters.

In what Caſes the Officer is impowered to determine Matters.

And ſometimes the Officer is impowered by the Order of Reference, to determine the Matters therein mentioned, as to tax Coſts, or to examine into the Regularity of Proceedings, or the Matters relating to the Practice of the Court.

No Reference on a Demurrer or Matter, touching the Juriſdiction of the Court.

And no Reference ſhall be made upon a Demurrer, or Queſtion touching the Juriſdiction of the Court, but ſuch Demurrer, *&c.* ſhall be heard and determined by the Court. *Ibidem.*

Report what.

A Report is a Certificate from the Baron, or the Officer of the Court (according to the Reference) how the Facts or Matters referred by the Court are, or do, upon examination, appear unto him; or of ſome Thing which it is his Duty to inform the Court in.

And

And they are to draw their Reports briefly and ſuccinctly, preſerving the Matter clearly for the Judgment of the Court, without Recital of the ſeveral Points of the Order of Reference, or the Debates of Counſel before them, unleſs it be in Caſes doubtful, when they may ſhortly repreſent the Reaſons which induce them to what they do.

Rules for drawing them up.

The Officer ſhall not on the Importunity of Counſel, or any other Perſon, make a ſpecial Report, unleſs required by the Court to do ſo, or that his own Judgment, with Reſpect to Difficulty, leads him thereto.

No ſpecial Report, but on Matter of difficulty, or by Order of Court.

No Exceptions will be allowed to the Officer's Report, upon Matters of Practice, nor on taxing Coſts; but if he allows ſuch Coſts, as ought not to be allowed, or are not allowable by Law, or if the Party againſt whom the Report is made, ſhall think himſelf aggrieved thereby, he may (upon proper Notice given) move the Court by his Counſel, and on ſuch Motion, the Court will examine into the Report, and relieve him, if they ſee Reaſon.

No Exceptions to the Officer's Report, on Matters of Practice, or on taxing Coſts, but the Party aggrieved, ſhall be relieved on Motion.

In the Caſe of *Latin* againſt *Moore*, in this Court, Exceptions were taken to the Officer's Report, about Practice, and Lord Chief Baron *Gilbert* made a gene-

Attorney to pay five Pounds out of his own Pocket for every Exception.

ral Rule, that no Exceptions ſhould be taken to the Officer's Report on Matter of Practice; but if any Attorney would except, he ſhould pay down and depoſite five Pounds out of his own Pocket for every Exception.

Exceptions only to be to Reports, that need Confirmation; or to ſpecial Reports, but Motion to be to diſcharge others.

No Exceptions are to be taken to a bare Certificate; and Exceptions are to be taken only to Reports, that muſt be confirmed by the Court, or ſpecial Reports, becauſe the Court is to paſs Judgment on them; but the Party who apprehends himſelf aggrieved, by ſuch other Reports, may move to diſcharge them. *Moſeley's Rep.* 256.

If Defendant excepts to the Report, the Plaintiff may alſo except.

If the Plaintiff moves to confirm the Maſter's Report *niſi*, and the Defendant ſhews for Cauſe, that he has taken Exceptions, the Plaintiff may alſo except to the Report, notwithſtanding his Motion. *Ibidem*, 305.

RULE. Time for entering Reports, Certificates and Affidavits.

By the 51ſt general Rule *pars*, all Affidavits, Certificates and Reports, are to be entered, at leaſt the Day before the Motion is made thereupon.

RULE. The Time for ſetting down Exceptions to Reports, to be argued.

By the 43d Rule *pars*, all Exceptions to Reports are to be ſet down to be argued by the Attorney concerned, within four Days after filing thereof, on ſuch Day as the Officer ſhall appoint; or on Default of procuring the ſame, to be ſet down and argued

argued, the ſame is to be diſallowed by an Order * to be taken out of courſe, without Motion.

To be diſallowed, if not ſet down in Time.

The Order for ſetting down the Exceptions to be argued, is to be ſerved on the oppoſite Party, four Days before the Day of Hearing.

Time for ſerving Order, for ſetting down Exceptions.

For the further Proceedings upon the ſeveral References and Reports, in this Court, ſee *Accounts*, *Proceſs of Contempt*, *Coſts*, *Exceptions to Anſwers per Tot. and Pleadings*.

Rehearings.

IT has been already ſaid, that every Order and Decree, although pronounced on the Hearing, is but interlocutory, until it be ſigned and enrolled, and may in that *interim* be altered by Re-hearing, and ſometimes by Motion. See Pa. 326. *Title Bill of Review.*

Every Order and Decree until ſigned and enrolled, may be altered by Rehearing, or by Motion.

* This part of the Rule, is altered by the preſent Practice; for now the Attorney for the Party in whoſe favour the Report is, moves the Court, to have the Exceptions over-ruled, upon Certificate that they are not ſet down to be argued.

Either Party may Petition for a Re-hearing, and the Proceedings thereon.

If either Party apprehends himſelf aggrieved by a Decree, in any Matter, which was at iſſue in the Cauſe, he may Petition the Court for a Re-hearing; and with his Petition he muſt produce a Certificate, ſigned by the Lawyers that were employed on the former Hearing; that the Cauſe is proper to be re-heard, and the Court will, at any Time before the Order is ſigned and inrolled, on Counſel's Motion, direct the Cauſe to be re-heard.

The Sum to be depoſited on a Petition for Re-hearing, and the Sum to be paid the adverſe Party.

The Party who would re-hear, is to give proper Notice of the Motion, and to depoſite five Pounds with the Officer, and muſt alſo, in four running Days after the Motion for ſuch Re-hearing, pay five Pounds more to the adverſe Party, to recompence him for his Coſts, if on ſuch Re-hearing no Relief be had; and in Default thereof, ſuch Re-hearing ſhall ſtand abſolutely diſcharged, as if no Re-hearing had been prayed, and the adverſe Party ſhall be at Liberty to make up and enrol his Decree.

The Sum depoſited to be paid back, if Party petitioning be relieved.

If the Party petitioning is relieved, he ſhall have back his Money depoſited.

Rehearing not a Matter of Right, and not granted, but on paying Coſt, or ſome other Terms.

But Re-hearings do not ſeem to be a Matter to which the Party has an abſolute Right, but diſcretionary in the Court, though they are ſeldom refuſed, when it is properly certified, that the Cauſe

Cauſe is proper to be re-heard; unleſs the Matter has ſlept a long Time, or ſome other good Cauſe appears. and they are not uſually granted, after any length of Time.

A Rule was made in the Court of *Chancery* in this Kingdom, the 7th *March* 1731, that no Re-hearing ſhall be granted in two Years after the Cauſe was originally heard, or Order made, againſt which the Party would re-hear. Ibidem.

In the Caſe of *Troy* againſt *Tate* in this Court, the 15th of *July* 1720, the Defendant petitioned for a Re-hearing, which was granted; but afterwards, the ſame Day, Plaintiff's Counſel moved to ſet aſide this Order; and on debate it was ordered, that the Defendant ſhould pay the Plaintiff, who was a *Pauper* thirty Pounds, in a Month, or the Order for Re-hearing, to be diſcharged: And on the 19th of *November* following, on further Debate, it was ordered, that the thirty Pounds ſhould be paid to the Plaintiff, the firſt Day of the next Term; and to be re-heard the firſt hearing Day; and if the thirty Pounds was not then paid, the Re-hearing to be diſcharged without further Motion. This Sum of thirty Pounds, was over and above the Depoſite. Ibidem.

In the Caſe of *Blake* and *Kirwan*, 21ſt of *February* 1722, the Petition for re-hearing, was rejected, it being after a Length Ibidem.

of Time, and in that Caſe, it was ſaid, that Re-hearings were not *ex debito Juſtitiæ*, but Matter of Favour.

Ibidem. And in the Caſe of *Adair* againſt *Mc'Cormick*, the 24th of *July* 1739, the Defendant petitioned for a Re-hearing, which was granted, but on Terms, that the Defendant was to procure the Outlawry to be reverſed.

Ibidem. In *Chancery*, in the Cauſe of *Killykelly* againſt *Lynch*, 23d of *January* 1744, the Defendant petitioned for a Re-hearing, after the Cauſe had been heard on the Maſter's Report, Exceptions and Merits, and an Iſſue directed, and it was ordered, that upon Defendant's paying to the Plaintiff, all the Coſts he had been put to in this Court, and at Law, ſince the pronouncing the Decree to an Account; the Cauſe to be re-heard. And much the ſame Rule was made in this Court, in *Trinity* Term 1749, in the Caſe of *Weſt* and *Weſt* againſt *Houghton* and others. See alſo, the Caſe of *Stuart* againſt *Maguin* in this Court, 28th of *May* 1757, where it was determined on full Debate, that the granting a Re-hearing, as alſo the Terms, on which granted, are entirely diſcretionary in Courts of Equity. And on this Motion, the Caſe of *Teniſon* and *Delaney*, in the *Chancery* of this Kingdom, was cited, where it had been lately ſo determined, and afterwards confirmed by

by the Houſe of Lords, of *Great-Britain*, on an Appeal.

If a Re-hearing be ordered, the Court upon an Attorney's Motion, will grant an Order for appointing the Cauſe to be ſet down, for a certain Day, on which it is to be re-heard: And two Days at leaſt, before the Day appointed for re-hearing, the Party petitioning muſt attend each of the Barons, with a Copy of the Decree, the Order for Re-hearing, and the Petition, on which the Re-hearing was granted, that they may be apprized of the Order, Decree, and Objections, againſt the ſame, and he muſt have the ſame ready to produce to the Court, on the Re-hearing; but in this Caſe, there is no Occaſion to ſerve a *Subpœna*, to hear Judgment, it will be ſufficient to ſerve the Order for re-hearing; but every Defendant, who was ſerved with the Order for Hearing, muſt be alſo ſerved with this Order, ſo determined in the Caſe of *Kearney* againſt *Stewart*, in this Court, *Hillary Term*, 1752; altho' the Error in the Decree, related but to one of the Defendants.

Cauſe if ſet down to be re-heard, the Barons to be attended with the Decree, the Petition, and Order for re-hearing, which are alſo to be produced to the Court, on the Re-hearing.

Subpœna to hear Judgment, not to iſſue on Re-hearings.

It is ſaid, the Court cannot alter the Notes taken on Hearing, but in the Term the Decree is pronounced in, but the Party aggrieved muſt re-hear.

Notes not to be altered, but in the Term the Decree was.

Exhibit may be proved, as on the Hearing; but no new Proof, but by ſpecial Leave.

Upon a Re-hearing, any exhibit may be proved *viva Voce*, as on the original Hearing; but no proof can be offered of any new Matter, without ſpecial Leave of the Court.

Re-hearing not to ſtop Proceedings, on a Decree appealed from, without ſpecial Order.

But the granting a Re-hearing ſhall not ſtop or hinder Proceedings, on an Order or Decree, appealed from, without the ſpecial Order of the Court, for the ſame. See 2d *Harriſon's Chanc. Pract.* 3d Edit. 87.

Party petitioning, ſhall have Benefit only of the Matter complained of, but the Decree ſhall be open in the Whole, as to the other Party.

In the Caſe of *Rawlins* againſt *Powell*, 1 *Peer Williams*, 300, upon the Plaintiff's petitioning to re-hear, Lord Chancellor declared, that the Cauſe was open as to the whole, and every Part of it, with Reſpect to the Defendant; while in Reſpect to the Plaintiff, it was only open, as to thoſe Parts complained of in the Petition.

Matter of Fact, miſtaken at the Hearing, to be ſet right, by Re-hearing.

If a Matter of Fact be miſtaken, at the Hearing, *&c.* it is to be ſet right by re-hearing, and not otherwiſe. 2 *Har. Ch. Pract.* 86, 3d Edit. 1 *Cha. Ca.* 54.

The Court will not re-hear a Cauſe, tho' the Decree has been open ſince the Inrolment.

The Court will not re-hear a Cauſe, after a Decree has been ſigned and inrolled, notwithſtanding the Cauſe had been open, ſince the Inrolment. 2 *Chan. Rep.* 2 *Har. Cha. Pract.* 3d Edit. 87.

And

And note, the Petition for re-hearing, is ſometimes general, as to the whole Decree; and ſometimes the particular Points, to which the Party would re-hear, are ſet out in the Petition; but in this laſt Caſe, Counſel muſt be very careful in ſetting out the Points complained of, as the Cauſe will be open only as to thoſe Points. But the Court will give the Party Leave to alter, or amend the Petition, at any Time, before the Cauſe is re-heard, and this was admitted by the Court, in the Caſe of *Napper* againſt *Croker*, in this Court, *Michaelmas* Term, 1754, although no Rule was made on the Petition, there being but two Barons on the Bench, and they having differed in Opinion.—And in the ſame Caſe, the Petition was preferred, immediately after pronouncing the Decree, ſitting the Court, and it was alſo admitted by the Court, that this might be done.

Petitions for Re-hearings, ſometimes general, and ſometimes particular.

May be altered, or amended.

May be preferred immediately after pronouncing the Decree.

In the Caſe of *Judkin* againſt *Hickie*, in this Court, the 25th of *February* 1757, it was inſiſted on by Mr. *Malone*, for the Plaintiff, and agreed to by the Court, that after a Hearing and Decree, a Plaintiff may file a Bill for Diſcovery, in Aid of a Re-hearing, without Leave of the Court; though it was urged, by Mr. Sollicitor General, on the other Side, that, though a Defendant might do ſo for Diſcovery

After Hearing, and a Decree, a Bill may be for Diſcovery, in aid of a re-hearing, either by the Plaintiff or the Defendant.

Diſcovery from the Plaintiff, a Plaintiff cannot do ſo againſt the Defendant, as he had it in his Power to introduce it in his Bill at firſt, and make a proper Uſe of it; and that if what Mr. *Malone* inſiſted on, was to be an eſtabliſhed Practice, Plaintiffs may file Bills *in Infinitum*, beſides, that as to the Plaintiff, ſuch a Bill, by him, would ſtand upon the ſame Footing with a ſupplemental Bill, which cannot be filed without the Leave of the Court. Caſes mentioned by Mr. *Malone*, were *Gainer* and *Gainer*, in *Chancery*, and *Healy* and *Milton*, in this Court, 2 *Chan. Rep.* 142. The like was done in the Caſe of Executors, *Trotter* againſt *Boyle*, and the contrary in *Chancery*, *January* and *April*, 1755.

Replication and Rejoinder.

Replication.

WHEN a full Anſwer is in, and the Plaintiff intends to proceed, he may forthwith file a Replication.

What.

And the Replication is the Conteſtation of the Anſwer, and muſt be filed, in order to put the Anſwer in iſſue.

Replications, general and ſpecial.

And Replications are either general, or ſpecial.

General Replication, what.

A general Replication, is a Reply, by the Plaintiff, to the Anſwer of the Defendant, and is an averring, or inforc-

forcing of the Allegations in the Bill, and an Avoiding, or Denying the Matters in the Anſwer.

A ſpecial Replication, is only putting ſome Part of the Bill in Iſſue, and ſo much of the Defendant's Anſwer, to that Part of the Bill; and in that Caſe, Witneſſes are to be examined, only to thoſe Parts, and not to any other Part of the Bill, or Anſwer; but a ſpecial Replication very ſeldom happens, though, in many Caſes, it would be for the Plaintiff's Benefit, and not make the Pleadings ſo prolix, as they generally are. 1 *Har. Ch. Pract.* 3d Edit. 408. Special Replication, what, and in what Caſes.

Or it is where a Defendant, by his Anſwer offers new Matter, which will not be brought into iſſue, by the Bill and Anſwer; or where he denies only one, or ſome few Points of the Bill. *Ibidem.* Ibidem.

And if it be needful to prove but one, or a few particular Points, the Plaintiff ought to reply to thoſe Points only, on pain of Coſts; but the Court generally orders Coſts at the Hearing, as they think fit. *Ibidem.* Ibidem.

The Replication affirms, and avers the Bill to be true; and it is to be ſhort, and muſt directly, and pertinently purſue the Subſtance of the Bill, and confeſs, and avoid, or traverſe, Replication what to contain.

Not to depart from the Bill.

verſe, or deny the Anſwer: and it muſt by no Means be a Departure from the Bill. *Ibidem.*

Or Defendant may demur, for the departure.

A Plaintiff having put Matters in his Replication, which were not contained in the Bill, and which the Plaintiff knew of, at the Time of exhibitting the Bill; the Defendant pleaded and demurred to the Replication, which the Court allowed of. 1 *Ch. Rep.* 259.

No Replication where Defendant demurs.

When the Defendant doth demur, or diſclaim only to a Bill, the Plaintiff cannot Reply. 1 *Har. Ch. Pract.* 409.

Often neceſſary to reply, tho' Plaintiff has no Witneſs to examine.

In many Caſes, tho' the Cauſe requires no Witneſſes to be examined, yet it may be neceſſary for the Plaintiff to Reply, whereby the Defendant will be put upon proof of his Anſwer, and the Plaintiff admitted to prove the Matters of his Bill: But if the Plaintiff reply to an Anſwer, and without Rejoinder or Rules, bring the Cauſe to a Hearing, the Anſwer ſhall be taken wholly true, as if there had been no Replication; for the Opportunity which the Defendant had of proving his Anſwer, is taken from him. 2 *Ch. Ca.* 21.

Cauſe may be heard, on Bill and Anſwer, if *Subpœna* to rejoin be not ſerved, tho' ſued out.

And if the *Subpœna* to rejoin, be not ſerved, *&c.* though it be ſued out, the Cauſe may be heard on Bill and Anſwer.

By

By the antient Civil Law, the Plaintiff was to give Security to proſecute his Suit in two Months, and if he did not, he was to be diſmiſſed, and anſwer Damages to the Party; this begot the Rule in Courts of Equity, that the Plaintiff muſt Reply within a limited Time, and if he makes Default, the Defendant may move for a Diſmiſſion, with Coſts.

Diſmiſs for Want of Proſecution; how at the Civil Law.

RULE. Time for replying, and Diſmiſs, for Want of a Replication.

And in this Court, by the 13th general Rule, where a Defendant hath fully anſwered a Bill, and files his Anſwer in Term Time, or in the four Days after *Eaſter* Term, or in the eight Days after any other Term, the Plaintiff ſhall have the next following Term, and to the End of the four, or eight Days of the next ſucceeding Term, to Reply; and if the Plaintiff will not in that Time file his Replication, then the Defendant, upon Motion to be made on the laſt Day, either of the ſaid four or eight Days, is to be diſmiſſed. But if the Anſwer be filed in Vacation Time, then the Plaintiff ſhall have Time to Reply, to the ſixth Day of the third following Term. And if the Plaintiff, after the Defendant hath been at the Charge of taking out a Certificate of no Replication, in order to diſmiſs, merely to prevent the ſame, ſhall put in a Replication, then the Defendant

If Plaintiff replies, after Defendant hath taken out a Certificate of no Replication, he is to pay Coſts.

Defendant ſhall be firſt paid the Coſt of his Certificate, and may, if he will forthwith rejoin *gratis* thereto, and may move the Court to inforce the Plaintiff to go to a Commiſſion, or in Default thereof, that the Defendant may have a Commiſſion *ex Parte*, to ſuch Commiſſioners as the Court, or the Chief Remembrancer ſhall appoint; or examine his Witneſſes before a Baron.

Defendant may compel the Plaintiff to examine, or in Default thereof, have a Commiſſion *ex Parte*.

But a Commiſſion *ex Parte* ſhall not iſſue, unleſs the Plaintiff hath lapſed a Vacation, and the Vacation after *Eaſter* Term is not accounted one. But if it be an Injunction Cauſe, the Defendant may oblige the Plaintiff to proceed by putting a Rule on him, to diſſolve the Injunction.

But not unleſs the Plaintiff hath lapſed a Vacation.

How Defendant is to proceed, if it be an Injunction Cauſe.

In the Caſe of *Lawrence* and others, againſt *Wheeler* and others, in this Court, a Bill was filed 25th *January*, 1681, and the Anſwer, the 15th *April*, 1682, and the Bill was diſmiſſed, for Want of a Replication, the 17th Day of *December*, 1682; ſo that the three Terms were accounted incluſive, from the Time of filing the Anſwer.

The three Terms for Replying, have been accounted incluſive.

The Plaintiff hath four Days of courſe to reply, after the Defendant hath moved on the Certificate, of no Replication for a Diſmiſs; and if no Replication be in theſe four Days, the Defendant

Plaintiff hath four Days to reply, after the Rule for a Diſmiſs.

Defendant may of courſe, and without ſerving the Order * iſſue a *Subpœna*, for the whole taxed Coſts.

After the *Subpœna* hath been iſſued, and ſerved, or even after an Attachment hath iſſued for the Coſts, the Court, upon Motion of the Plaintiff's Attorney, will give the Plaintiff leave to retain his Bill, on paying the Coſts; and the Coſt to be paid in this Caſe, is only the Coſt of the Rule to diſmiſs the Certificate, the Coſt of taxing, and the *Subpœna* and Service, and of the Attachment, if it has iſſued. It was otherwiſe formerly, (as it is now in *Chancery*) *i. e.* the Coſts mentioned in the *Subpœna*, or Attachment, muſt have been paid; but Baron *Wainwright* altered it, as it now ſtands.

Plaintiff may retain his Bill, even after the Attachment for Coſt hath iſſued upon payment of Coſt.

If after the Motion, the Plaintiff neglects to pay the Coſts, the Defendant's Attorney, may, on Motion, obtain an Order, that the Plaintiff ſhall pay the ſame, and the Coſt of this laſt Order, in four Days after Service, or that the Defendant may be at Liberty to proceed.

How to proceed, if Plaintiff after moving to retain the Bill, pays not the Coſt.

If

* The Court have had it under Conſideration, for ſome Time paſt, to alter this Practice, and to have the Order ſerved. Then, if no Replication be in four Days after Service, on an Affidavit of ſuch Service, the Officer to iſſue the *Subpœna*, for Coſts. But is not the *Subpœna* a ſufficient Notice? and if ſo, would not this Alteration rather multiply Expence, to no purpoſe?

If Plaintiff pays the whole Coſt, before the Motion.

If the Plaintiff pays the whole Coſts, before he moves to retain his Bill, he muſt abide by it.

RULE. Plaintiff to reply to all the Defendants, who have anſwered, tho' there be others who have not anſwered, or to be diſmiſſed with Coſts.

By the 12th general Rule, where a Plaintiff prefers a Bill, againſt ſeveral Defendants, ſome of them anſwer, and ſome of them do not, and the Plaintiff neglects to reply, to ſuch as have anſwered, within the Time limited, by the preceding Rule, upon pretence that he cannot reply without the Anſwers of the other Defendants; in this Caſe, ſuch Defendants as have anſwered, are to be diſmiſſed with Coſts, upon Motion, unleſs the Plaintiff will make it appear, by a Certificate from the Chief Remembrancer, that he hath proſecuted the Contempts againſt the reſt of the Defendants, with Effect.

Unleſs he hath effectually proſecuted the Contempts againſt the others.

Or unleſs the Defendants, who have not anſwered, be intitled to Privilege of Parliament.

But where there are ſeveral Defendants to a Bill, and that one or more of the Defendants be entitled to Privilege of Parliament, if all the Defendants have anſwered, except the Defendant or Defendants, entitled to Privilege, the Plaintiff may, in this Caſe, (to prevent the Defendants, who have anſwered, from diſmiſſing his Bill, for Want of a Replication) move the Court by his Attorney, for Time to reply, to ſuch Defendants as have anſwered, until

til the Defendant, or Defendants in Privilege ſhall anſwer, and the Court will grant it.

RULE. Plaintiff may diſmiſs his Bill for Diſcovery only, on paying every Defendant 20 s. Coſts.

By the 14th general Rule, where a Bill is only for Diſcovery, and the Defendant hath fully anſwered the ſame, if the Plaintiff diſmiſſes his Bill within the Time limited for that purpoſe, by the aforeſaid Rule for replying, he may do ſo, upon paying every Defendant that hath anſwered, twenty Shillings Coſts; but if he neglects ſo to do, the Defendant may, on Certificate of no Replication, and on Motion thereon as aforeſaid, diſmiſs the Bill, and have taxed Coſts.

Or Defendant may diſmiſs it, with taxed Coſts.

But if it be for Relief, the Plaintiff muſt pay taxed Coſts.

So that by this Rule, it ſeems, that if the Bill be for Relief, the Plaintiff, on diſmiſſing it, muſt in all Caſes pay taxed Coſts, and ſo is the Practice. But ſee *Titles*, *Coſts*, and *Diſmiſs*.

Plaintiff to pay the Coſt, on his diſmiſſing his Bill, or Defendant may have it taxed, and iſſue a *Subpœna* for it.

If the Plaintiff diſmiſſes his own Bill, but neglects to pay the Coſts, the Defendant muſt, in this Caſe, obtain an Order, for the Plaintiff to pay the Coſts, and alſo the Coſts of this laſt Order, in four Days after Service thereof, or the Defendant to be at Liberty to proceed and tax the Coſts, and iſſue a *Subpœna* for the ſame, which the Court will grant, on Motion of the Defendant's Attorney.

Diſmiſs ſet aſide, where the Bill was to be quieted, againſt frequent Diſtreſſes.

In the Caſe of *Colſon* againſt *Hyde*, in the High Court of *Chancery*, 1730, a Diſmiſs, for Want of a Replication, was, on Motion, ſet aſide, this being a Bill to be quieted againſt frequent Diſtreſſes, on lodging the Money in Court, *in Uſum Jus habentis*, and the Plaintiff having an Order for an Injunction, on bringing in his Rent: The Reaſon why the Diſmiſs was ſet aſide, was, becauſe the Plaintiff had already the Effect of his Bill, ſo that to reply, and bring the Cauſe to a Hearing, would be nugatory, as the Court in ſuch Caſe, could give the Plaintiff no Decree.

On Plea or Demurrer allowed, Bill to be diſmiſſed.

Where a Plea or Demurrer is put into the Bill, and the Plea allowed and proved, and the Demurrer allowed, the Bill is to be diſmiſſed. See Title, *Demurrer* and *Plea*.

One Replication ſufficient to ſeveral Anſwers.

One Replication is ſufficient to ſeveral Anſwers in the ſame Cauſe, by naming all the Defendants therein, to which the Plaintiff is adviſed to reply.

Serving the Defendant with *Subpœna*, to rejoin.

When the Plaintiff hath filed his Replication, and that the Defendant is not under an Obligation to rejoin *gratis*, he may forthwith ſerve the Defendant with a *Subpœna*, to rejoin; and upon Affidavit of the Service thereof, and upon Motion of the Plaintiff's Attorney thereon,

thereon, the Court will make an Order for the Defendant to rejoin and join, in Commiſſion, in * four Days, and the Defendant's Attorney is to be ſerved with a Copy of the Notes taken in Court, (for no Order is made out in this Caſe, nor is the Copy of the Notes to be atteſted, but the Plaintiff's Attorney uſually writes theſe Words at the Foot thereof, to wit, *Copy Notes*,) and the Plaintiff's Attorney, may at the ſame Time, that he ſerves the Rule to rejoin, ſerve the Defendant's Attorney with Commiſſioners Names, for the Examination of Witneſſes, if he examines in the Country, or with the Names of Witneſſes, if he examines in Town, and may in eight Days, after leaving his Commiſſioners Names in the Office, have at his own Charge, a Commiſſion *ex Parte*, without any further Affidavit, or Order, and proceed as before directed, by Rule 19. Title *Interrogatories*, &c. Pa. 581, and 583. Title *Interrogatories*, &c.

And this *Subpœna* to rejoin, is in Order to cloſe the *Litis Conteſtatio*, and is according to the old Civil Law, which required

The *Subpœna* to rejoin is according to the old Civil Law.

Z 2

* In the Caſe of *Delarne* and *Lewis*, in this Court, on a Motion to ſet aſide the Officer's Report, it was ſettled, that the four Days are running Days; and that the Rule to rejoin may be entered immediately after Service of the *Subpœna* to rejoin, without waiting four Days, as was formerly thought.

required a Citation in order to form the Act of the Court; and therefore, the firſt Citation was to anſwer; the ſecond was to rejoin, upon which the probatory Term was formed, and was previous to the Examination of Witneſſes; and the third was the *Subpœna*, or Citation to hear Judgment; but if the Defendant delayed the Plaintiff upon the firſt Citation, the Court very juſtly might impoſe Terms upon him to rejoin *gratis*, and that he ſhould conſent to form the probatory Term without the Service of a *Subpœna* to rejoin.

Ibidem. And the Civilians and Canoniſts held it abſolutely neceſſary, that there ſhould be a Citation to the Defendant, previous to the Examination of Witneſſes, otherwiſe the *Receptio Teſtium* is an abſolute Nullity, and the Reaſon they give is, that the Defendant, if cited, might either examine, or object to their Credibility, or put ſuch croſs Interrogatories to them, as might bring out Circumſtances in his Favour, which he would not have an Opportunity to do, if he were not cited; but it is not neceſſary for the Defendant to appear, becauſe the Citation is in his Favour, and he may renounce a Privilege introduced in his Favour. *Amator Rodriquez de Form. Prob.* 196.

If Defendant is obliged to rejoin *gratis*, he is to be ſerved with the Rule. If the Defendant be under an Obligation to rejoin *gratis*, the Plaintiff is to ſerve him with the Order for that Purpoſe,

poſe, and if he doth not in four Days after Service thereof file his Rejoinder, the Plaintiff may ſerve his Commiſſioners Names, and proceed as is before directed. See *Title Interrogatories.*

The Time the Defendant has to rejoin.

For the Time given the Defendant to rejoin to the Plaintiff's Replication, and how the Plaintiff is to proceed to ſpeed his Cauſe, in Caſe the Defendant ſhould not rejoin or ſhould neglect to rejoin in Time, See *pa.* (475) Title *Hearing* and *pa.* (581, 583) Title *Interrogatories.*

Defendant may, if he will, rejoin *gratis.*

When the Plaintiff hath replied, the Defendant may, if he will, forthwith rejoin *gratis.*

On a general Replication, if Defendant lives above forty Miles from *Dublin*, on Affidavit thereof the Court will give leave to ſerve Defendant's Attorney with *Subpœna* to rejoin.

When the Plaintiff files a general Replication, if the Defendant lives above forty Miles from *Dublin*, upon Affidavit thereof, and upon Motion of the Plaintiff's Attorney thereon, the Court will Order that Service of the Defendant's Attorney with the *Subpœna*, to rejoin ſhall be good Service of the Defendant; but this Rule is generally entered of courſe in the Office; and note, this Order is to be ſerved on the Attorney, at the ſame Time with the *Subpœna* to rejoin.

So, on a ſpecial Replication, upon Affidavit of Defendant's liv-

Twentieth of *June* 1743, it was ordered, That in all Caſes where a Plaintiff files a ſpecial Replication, that upon an

ing above fifty Miles from *Dublin*.

Affidavit filed, of the Defendant's living above fifty Miles from *Dublin*, and upon Motion thereon, by the Plaintiff's Attorney, that the Service of the Defendant's Attorney with *Subpæna* to rejoin, be deemed good Service.

Rejoinder what to contain.

The Rejoinder muſt purſue and confirm the Anſwer; and muſt ſufficiently avoid or traverſe every material Point of the Replication.

On a ſpecial Replication, *Subpæna* to rejoin muſt be ſerved.

Though a Defendant ſhould be obliged to rejoin *gratis*, yet if a Plaintiff files a ſpecial Replication, he muſt ſerve the Defendant with a *Subpæna* to rejoin.

If Plaintiff may put in a general Replication after Plea or Demurrer to a ſpecial Replication allowed.

After a Plea, or Demurer to a ſpecial Replication allowed, the Plaintiff may put in a general Replication: *Sed Quær.* and *vid.* 1 *Vern* 351, where it was urged by Counſel, that he may; but the Court refuſed to give any Opinion.

On Re-hearing, Plaintiff had leave to reply.

The Plaintiff ſet down his Cauſe to be heard on a Bill and anſwer, and had a Decree againſt the Defendant by Default, and when the Defendant came to ſhew Cauſe againſt the Decree, it was altered in his Favour; the Plaintiff petitioned to re-hear the Cauſe, and at the Re-hearing, prayed Leave to Reply to the Defendant's Anſwer, and had it, paying Coſts. *Mich.* 1699, between Lord

Lord *Donegal* and *Warr*, 1 *Har. Ch. Pract.* 3d *Edit.* 410.

In the Caſe of *Rodney* againſt *Hare*, *et al. Moſeley's Rep.* 296, the Maſter of the *Rolls* held, that the Cauſe was at Iſſue by the Replication; for the Iſſue is offered by the Defendant's Traverſe, and a Rejoinder is only a Fiction of the Court, and is never actually filed.

Cauſe at Iſſue by the Replication.

Where Witneſſes have been examined, and no Replication filed, the Court at the Hearing, or even after a Decree, will order a Replication to be filed, *nunc pro tunc*. *Ibidem*, and 2 *Vern.* 46.

Replication may be filed after Examination, and after a Decree, *nunc pro tunc*.

In the Cauſe of *Niccoll* againſt *Wiſeman*, in *Eaſter* Term, 1688, the Cauſe came on to be heard the Term before, and then the Plaintiff had replied to the Plea only, and not to the Anſwer; and the Court thereupon made an Order, that the Plaintiff ſhould file a Replication to the Anſwer, *nunc pro tunc*, and that the Cauſe ſhould be heard this Term: And the Plaintiff now ſet down the Cauſe for hearing again, without having given Rules for Publication, and had alſo amended his Bill, and had not new ſerved the Defendants to anſwer; ſo the Cauſe was again put off, as coming on irregularly. *Ibidem.*

Where there is a Plea and Anſwer, and the Plaintiff replies, the Replication muſt be to the Anſwer as well as the Plea.

If, after the Plaintiff hath filed a Replication, he is inclined to have the

A Replication may be withdrawn, and the

Cauſe heard on Bill and Anſwer.

Cauſe heard upon the Bill and Anſwer, or would amend his Bill, the Court, upon Motion of the Plaintiff's Counſel, on Notice duly ſerved, will give the Plaintiff Liberty to withdraw the Replication; but to pay the Coſts of the Rejoinder, if it be filed.

After Replication, the Defendant cannot obtain a Diſmiſs, but on hearing the Cauſe.

If the Plaintiff replies, the Defendant can never diſmiſs the Bill, without hearing the Cauſe; becauſe he may rejoin *gratis*, and prove his Anſwer, and ſo bring the Cauſe to a Hearing, as is before directed, p. 498. Title *Hearing*.

Of Witneſſes, Evidence, and Proof.

What ſhall be admitted as Evidence, and will amount to ſufficient Proof.

Evidence in *Chancery* uſually by Depoſitions.

AS to Evidence, the uſual Courſe in *Chancery* is by Depoſitions; for no Witneſſes, *viva Voce*, are allowed at the Hearing, except by ſpecial Order.

Depoſitions, how and by whom taken.

And theſe Depoſitions are at this Day the Teſtimony of the Witneſſes, *ore tenus*, taken down in Writing by the Examinators, or the Commiſſioners: And this firſt Writing is called the *Dominicles*,

minicles, or Paper Draught, which, if the Examination be in Town, remain in the Hands of the Examinators; but if it be by Commiſſion in the Country, they are returned with the Commiſſion to the Court, and are filed in the Chief Remembrancer's Office.

Atteſted Copies of theſe Depoſitions, and of all the Proceedings in this Court, are Evidence.

And the Copies of theſe Depoſitions are made out, and atteſted at the Requeſt of either Party, either by the Officer or by the Examiners, as the Caſe is, (which Examiners, in this Court, are the Clerks to the ſeveral Barons); and the Copies of theſe Depoſitions, ſo atteſted, as alſo the Copies of all other the Proceedings in this Court, may be given in Evidence; for the Originals of theſe are ſuppoſed to be in themſelves Evidence: And by Conſequence, when a Copy of them is produced on Oath, or fully authenticated, you have full Proof; becauſe you have the Proof of a Matter which, if produced, would carry its own Light with it, and by Conſequence would need no Proof of it.

The Difference between a Copy by a Perſon intruſted for that Purpoſe, and a Perſon not ſo intruſted.

But here a Difference is to be taken, as to Office Copies, between a Copy authenticated by a Perſon intruſted to that Purpoſe, for there that Copy is Evidence; and a Copy, atteſted by an Officer of the Court, that is not intruſted to that Purpoſe; for that is not Evidence, without proving it actually examined:

mined: And the Reaſon of the Difference is, that where the Law hath appointed any Perſon for any Purpoſe, the Law muſt truſt him as far as he acts under the Authority that the Law has given him, otherwiſe it would be to give Credit, and not to give Credit to him at the ſame Time.

A Copy, made out by a Perſon not intruſted, muſt be proved.

But if an Officer of the Court, that is not intruſted to that Purpoſe, makes out a Copy, it muſt be proved that it was examined; becauſe, being no Part of his Office, it is to be credited but as a private Man's mere Writing, or Word, ought to be credited, without Oath. See the *Law of Evidence*, by a late learned Judge, p. 18, 19.

But the Copies of all Proceedings in this Court, are of themſelves Evidence in this Court.

But the Office Copies of Depoſitions, and all other the Proceedings in this Court, are of themſelves Evidence in this Court, but not in any other, without being examined with the Originals, and the Atteſtation of them proved. And the ſame Rule holds in this Court, *Vice verſa*, as to the Copies of Pleadings or Proceedings in other Courts; for every Court, for their Convenience, have allowed their Office Copies atteſted, to be Evidence in their own Court, and have impowered their Officers to make ſuch Copies as ſhould be Evidence; but the particular Rules of one Court are not taken Notice of by others, and theſe Copies may be

The Copies of Depoſitions may be read, without producing the Bill and Anſwer.

be read in all Caſes, without producing the Bill and Anſwer.

Although all theſe Tranſactions in a Court of Equity be public Matters, yet are they not of Record; and the Reaſon why they are not Records, is, becauſe they are not the Precedents for Juſtice, and are founded only upon the Circumſtances of each private Caſe, and the Judgment there is *ſecundum æquum & bonum*, and not *ſecundum Leges & Conſuetudines*. *Co. Lit.* 260. *a.*

The Proceedings in this Court no Records, and why.

Now, not being Records, they are not ſuch Memorials as are lodged inſeparably in any certain Place, but transferrable; and therefore may themſelves be given in Evidence. See *Law of Evidence*, by a late learned Judge, p. 37.—But note, Where any Pleading or Proceeding is to be brought up to the Court, an Order ſhould be firſt obtained for that Purpoſe, which the Court will grant on an Attorney's Motion.

The Pleading or Proceeding may itſelf be given in Evidence.

But an Order ſhould be firſt obtained for bringing it up.

But though theſe Depoſitions, or the Defendant's Anſwer are not of themſelves Records, yet they are Oaths in a Court of Record; and a Witneſs ſwearing falſely there, may be proſecuted either at Common Law, or on the Statute, becauſe it is a Perjury in a Court of Record. *Ibidem*, 49.

Tho' theſe Depoſitions, or a Defendant's Anſwer, be not Records, yet a Defendant, or a Witneſs, ſwearing falſely, may be proſecuted for Perjury.

When

The Court, on Motion, will give Leave to uſe, on the Hearing of the Cauſe, Depoſitions taken in a former Cauſe, ſaving Exceptions.

When either of the Parties, Plaintiff or Defendant, in the Cauſe, would, upon the Hearing thereof, make Uſe of Depoſitions formerly taken in another Cauſe, in ſuch Caſes, as by the Rules of Courts of Equity they may, the Court will of courſe, and upon an Attorney's Motion, make an Order for that Purpoſe; but always ſaving Exceptions.

RULE. And the Parties are to have the Benefit reciprocally.

And by the 40th general Rule, when, upon Motion of either Party, Plaintiff or Defendant, the Court doth order, that Uſe may be made of any Depoſitions, formerly taken in another Cauſe between the ſame Parties, (or thoſe under whom they claim) touching the Matter in Queſtion, it is thereby intended, that the other Party have the ſame Benefit of the Depoſitions; and both Parties have Liberty of their lawful Exceptions at the Hearing, to any of the ſaid Witneſſes formerly examined. See 1 *Ch. Ca.* 175.

But this Rule to be underſtood between Plaintiffs and Defendants only.

But note, It is ſaid, that this Rule of reading Depoſitions, formerly taken in another Cauſe between the ſame Parties, is to be underſtood to be between Plaintiffs and Defendants only; for when there are ſeveral Defendants in a Cauſe, and that they, or any of them, examine Witneſſes in that Cauſe, ſuch Depoſitions ſhall not be uſed by one of thoſe

thoſe Defendants againſt any of the other Defendants, in any after Cauſe between them, relative to the ſame Matter.

Depoſitions in a former Cauſe, in which the Matters in Queſtion were in Iſſue, may be read in Evidence.

There being the ſame Queſtion in both Cauſes, and Defendant's Defence being the ſame, the Depoſitions in a former Cauſe ſhall be read againſt him: But Depoſitions in another Cauſe, in which the Matters in Queſtion were not in Iſſue, ſhall not be read. *Treatiſe of Equity*, p. 123.

But Depoſitions in a Suit between other Parties, are not to be given in Evidence.

So Depoſitions taken in a Suit between other Perſons, are not to be given in Evidence; for he had no Opportunity to croſs-examine the Witneſſes. *Ibidem.* and *Hard.* 472.

The Advantage ought to be reciprocal.]

So Depoſitions, taken in a Cauſe where the Plaintiff's Father was a Party to the Suit, being in all Matters the ſame, his Father being only Tenant for Life, thoſe Depoſitions could not be read againſt him; for the Advantage ought in all Caſes to be reciprocal. 1 *Vern.* 413.

But cannot be uſed againſt one whodoesnotclaim under the Party againſt whom they were taken.

But Depoſitions, taken in a former Cauſe, cannot be read in another Cauſe, againſt one who does not claim under the Party, againſt whom the Depoſitions were taken. *Ibidem*, and 1 *Ch. Ca.* 73.

But

Where a Legatee may have the Benefit of Depoſitions taken in a Suit by a former Legatee.

But if a Legatee brings a Bill againſt the Executor, and proves Aſſets, another Legatee, though no Party, may have the Benefit of theſe Depoſitions. 1 *Vern.* 413. 2 *Vern.* 447.

If the Cauſe ſtand over, to add a material Defendant, the Depoſitions taken before cannot be read againſt him.

In the Caſe of *Nibbet* againſt *Daniel*, *Bunb. Rep.* 310, it was declared by the Court, that if a Cauſe be brought to a Hearing, and there is an Objection for Want of Parties, and the Court lets the Cauſe ſtand over with Liberty to the Plaintiff to add a Party; if that Party is a *material Defendant, and concerned in Intereſt*, the Depoſitions taken before cannot be read againſt this Defendant, he not being a Party when Iſſue was joined, and the Commiſſion executed. And note, at the Foot of the Caſe there is a *Quære*, What Method is to be taken, ſince there cannot be an Examination *de novo*, as Publication was paſſed?

General Rule, that Depoſitions cannot be made Uſe of againſt a Perſon, not a Party to the Suit.

So that the *general Rule* in Co 1s Equity ſeems to be, that a Depoſition cannot be given in Evidence againſt any Perſon, who was not a Party to the Suit; nor ſhall he be allowed to give it in Evidence; for if he cannot be prejudiced by the Depoſition, he ought not to be benefited by it; for then he might uſe all the Depoſitions that made for him, while thoſe which made againſt him

him could not be made Uſe of by the other Side. *Hard.* 472.

But Depoſitions were admitted to be read in *Chancery*, thirty Years after they were taken, though the Parties were not the ſame, inaſmuch as the Cauſe related to the ſame Land, and the Ter-tenants were Parties to it; and this is an Indulgence of the *Chancery* beyond the ſtrict Rules of Law, and is admitted for pure Neceſſity, becauſe Evidence ſhould not be loſt; beſides, the *Chancery* hath great Faith in its own Examinations. 1 *Ch. Rep.* 75.

But Depoſitions were read in *Chancery* thirty Years after they were taken, tho' the Parties were not the ſame, as the Cauſe related to the ſame Land, and the Ter-tenants were Parties.

In the Caſe of *Peter Delamar* againſt *Mary Delamar*, in *Chancery*, *Trinity* Term, 1759, it was debated, if Depoſitions, which had been taken in a former Cauſe, wherein one *Garret Delamar* was Plaintiff, and the ſaid *Mary Delamar* and others were Defendants, and the Plaintiffs in the preſent Cauſe no Party, ſhould be read as Evidence for the Plaintiff.——It was objected, on the Behalf of the Defendant *Mary Delamar*, that, as the Plaintiff was not a Party in the Cauſe, in which the Depoſitions are taken, the Defendant could not read them againſt the Plaintiff, and the Benefit would not be reciprocal. To this it was anſwered, by the Counſel for the Plaintiff, that it was not abſolutely requiſite, on ſuch Applications as theſe, that

Depoſitions in a former Cauſe ſhall be read on the hearing of a ſubſequent Cauſe, tho' not between the ſame Parties, if the Title be the ſame.

that the Advantage ſhould be reciprocal; and inſtanced the Caſe of *Archdall* againſt *Morriſon*, in this Court, *Eaſter* Term, 1752: And ſo the Court ſeemed to think; but, that in the preſent Caſe it appeared, that the Title was the ſame with that of the Plaintiff, in the Cauſe in which the Depoſitions were taken, they both claiming under Remainders in the ſame Settlement; and *Mary Delamar*, the Defendant in the preſent Cauſe being the ſame Perſon as in the Cauſe wherein the Depoſitions were taken, and had an Opportunity to, and did croſs-examine: Beſides, the preſent Bill was an original Bill, in the Nature of a Bill of Rivivor, praying, that all the former Proceedings may ſtand revived, by which the Plaintiff had bound himſelf; and by the Plaintiff's reading the ſaid Depoſitions, the Defendant had an Advantage; for ſhe was thereby intitled alſo to read the Depoſitions in that Cauſe. Lord Chancellor, for theſe Reaſons, was clear of Opinion, that the Proofs in the former Cauſe were proper to be read in this Cauſe.

Depoſitions in one Cauſe may be uſed in a croſs Cauſe, without Motion.

Depoſitions in the original Cauſe, may be uſed in a croſs Cauſe, without Motion. And where one Party obtains an Order, the other may uſe the ſame, without Motion. 2 *Harriſon's Chan. Practice*, 3d Edit. 52.

In

In croſs Cauſes, an Agreement was proved in one of the Cauſes; and in that Caſe it was not ſet forth in the Allegations of the Bill or Anſwer. In the other Cauſe, it was ſet forth in the Bill, but not proved in the Cauſe; and an Order was obtained before Publication, that the ſame Depoſitions ſhould be read in both Cauſes. And by the better Opinion, this might be; for, ſince the Order was before Publication in the ſecond Cauſe, the Defendant had Liberty to croſs-examine; and the Sight of the Depoſitions were for his own Advantage. 1 *Ch. Rep.* 236.

An Agreement proved in the original Cauſe, but not in Iſſue, and in Iſſue in the croſs Cauſe, but not proved, ordered, that the ſame Depoſitions ſhould be read in both Cauſes.

Where a Cauſe is diſmiſſed, the Matter of it not being proper for Equity to decree, yet the Depoſitions on a Fact in the Cauſe may be uſed as Evidence, whenever it ſhall come in Queſtion again in a new Cauſe between the ſame Parties. 1 *Ch. Ca.* 175. 1 *L. Raym.* 735.

When Depoſitions in a Cauſe diſmiſſed ſhall be uſed.

But when a Cauſe is diſmiſſed, not upon this Ground, but for Irregularity, ſo that in Truth there was never regularly any ſuch Cauſe in the Court, and, conſequently, no Proofs, thoſe Proofs cannot be uſed; for Proofs cannot be exemplified without Bill and Anſwer; nor can they be read at Law, unleſs the Bill, upon which they were taken, can be read. 1 *Ch. Ca.* 175.

And when not.

All Depoſitions to be taken in a Court of Record; and each Party may read any Part, and the Whole.

No Depoſitions ought to be allowed which were not taken in a Court of Record, and they are like Examination of Witneſſes; ſo that although the Defendant may read what Part he will; yet the other Side may read the Whole afterwards. *Treatiſe of Equity*, 123.

If a Witneſs dies before he ſigns his Examination, the Depoſitions cannot be made Uſe of.

Where a Witneſs dies after Examination, but before ſuch Examination is ſigned by him, the Depoſitions cannot be made Uſe of, for the Examination is not compleat until it is read over, and ſigned by the Witneſs; as he may at any Time before he ſigns it amend or alter it. 1 *Williams* 414.

But upon an irregular Examination, if the Witneſs dies before he can be re-examined, after an Order for that Purpoſe, the former Depoſitions ſhall be read.

But yet, where the Defendant after Publication examined a Witneſs, and conceiving himſelf irregular in ſuch Examination; on the uſual Affidavit, that the Defendant, his Clerk, or Solicitor had not, nor would, ſee any of the Depoſitions, he got an Order to re-examine this Witneſs, but the Witneſs died before a Re-examination, and the Court gave Leave to the Defendant, to make Uſe of the former Depoſitions of the ſame Witneſs. *Ibidem* 415.

The Evidence of a Witneſs at a former Trial of an Iſſue, and alſo his Depoſitions in a Cauſe between the ſame Parties, may af-

In the Caſe of *Coker* againſt *Farewell*, *Hillary* Term 1729, before Lord Chancellor *King* and the Maſter of the Rolls, a Witneſs who had been examined at a former Trial of an Iſſue, between the ſame

ſame Parties, and had been examined in the Cauſe, died, and it was held, that not only his Depoſitions may be read, upon a new Trial, but what he ſwore at the former Trial, may be given in Evidence againſt the ſame Parties. 2 *Williams* 563.

ter his Death be given in Evidence at a new Trial.

In *Moſeley*'s *Reports*, 118, *Hillary* 1728, at the Rolls, it was determined, if a Witneſs is examined in this Court, you may read without any Order, any other Depoſitions of the ſame Perſon, in the ſpiritual Court, or elſewhere, in any other Cauſe, ſo that you make Uſe of them only to confront the Evidence he then gives.

Depoſitions of a Witneſs in another Cauſe, or Court, may be read againſt him, without Order, to ſhew the inconſiſtence of his Evidence.

A Witneſs being examined *de bene eſſe*, died before any Replication filed, or Examination in chief; the Court, on Motion of the Plaintiff's Counſel, ordered theſe Depoſitions to be read in Evidence, at a Trial at Law; notwithſtanding the Defendant's Anſwer was put in above five Weeks before the Defendant died, for, that otherwiſe, an Examination *de bene eſſe*, would be to no Purpoſe. 1 *Vern.* 331.

Depoſitions of a Witneſs examined *de bene eſſe*, he dying before he was examined in chief, ordered to be read at a Trial at Law.

In the aforeſaid Caſe of *Delamar* againſt *Delamar*, in *Chancery*, *Trin.* 1759, an Ejectment being brought at Law, upon the Title, a Bill was filed in this Court to remove temporary Bars,

A Court of Equity will not order Depoſitions to be read in Evidence on a Trial at Law, but where the Trial is directed by the Court of Equity.

and for Liberty to give in Evidence upon the Trial, Depoſitions that had been formerly taken in a Cauſe, which had been commenced by one *Garret Delamar*, deceaſed, againſt the ſame Defendant, and no other Relief was prayed by the Bill: The Cauſe was heard, and it was decreed that all temporary Bars ſhould be removed; but as the Title was meerly at Law, and the Trial not directed by the Court of *Chancery*, nor in any Sort, in Conſequence of any Order of the Court, his Lordſhip would make no Order, as to reading in Evidence, the Depoſitions on the Trial at Law.

In the Debate, the Caſe of *Sharp* and *Maxwell*, in the ſaid Court, was inſtanced by the Counſel for the Plaintiff; but in that Caſe, general Relief was prayed in the Bill, here only ſpecial Relief, and the Bill in that Caſe was retained, with Liberty to try the Title at Law, and there were alſo ſeveral ſpecial Circumſtances attending that Caſe, not in the preſent.

And his Lordſhip alſo ſaid, that a Court of Equity, the Title being at Law, will not interfere with the Court of Law, whether the Depoſitions be legal Evidence or not.

The

The Bill in *Chancery* is Evidence againſt the Plaintiff, for the Allegations of every Man may be ſuppoſed true againſt himſelf; nor ſhall it be ſuppoſed to be preferred by the Counſel, or Solicitor, without the Party's Privity; and if the Counſel hath mingled it with any Fact, that is not true, the Party may have his Action. 1 *Sid.* 221. 1 *Vent.* 66.

The Bill in *Chancery*, Evidence againſt the Plaintiff.

But where a Bill is exhibited, and there are no Proceedings upon it, it cannot be Evidence, unleſs it be proved it was exhibited with Privity; for any one may file a Bill, in another's Name, to rob him of his Evidence by a ſham Conceſſion; and it is unreaſonable to ſuppoſe the Party filed it, when there are no Proceedings on it, for then the filing would be to no Purpoſe; and it is more likely to be done by a Stranger to prejudice him. 1 *Sid.* 221. 1 *Ch. Rep.* 651. 1 *Ch. Ca.* 64.

But not unleſs there be Proceedings upon it.

This is accounted to ſtand in Point of Credibility, in the ſame Circumſtances as a Confeſſion, by Letter under the Party's Hand, though no Body ſaw the Writing of it; though ſome have ranged it in an inferior Degree, becauſe one is the Party's own immediate Confeſſion, and the other is only a Counſel's Draft; yet it ſeems, the Allegation in

How far it ſtands in Point of Credibility.

a Court of Juſtice, that amounts to the Confeſſion of any Fact, ought to have more Weight and Authority with it, than any private owning. See the *Law of Evidence*, by a late learned Judge, 38.

The Anſwer ſtronger Evidence againſt the Defendant, becauſe on Oath.

And if the Bill be Evidence againſt the Complainant, much more is the Anſwer againſt the Defendant, and carries ſtill a higher Weight of Probability along with it, becauſe on Oath. *Goldſby*, 326.

But the whole muſt be read.

But when you read an Anſwer, the Confeſſion muſt be all taken together; and you ſhall not take from thence what makes againſt the Defendant, and leave out the reſt, but the whole. 5 *Mod.* 10.

In ſome ſpecial Caſes the Anſwer of one Defendant may be read againſt another.

Regularly, the Anſwer of one Defendant ſhall not be made Uſe of, as Evidence againſt another Defendant; but one Defendant ſaying, by his Anſwer, that he was much in Years, and could not remember the Matter charged in the Bill, but that *J. S.* was his Attorney and tranſacted this Matter, and *J. S.* being made a Defendant, and giving an Account of the Matter; here, upon Motion for an Injunction, Lord *Cowper* ſaid, theſe Words in the firſt Defendant's Anſwer, amounted to to a referring to the other Defendant's Anſwer, and for that Reaſon, the Attorney's Anſwer

ſwer ought to be read, and accordingly was read againſt the firſt Defendant. 1 *Peer Williams*, 301.

The Anſwer of a ſuperannuated Perſon put in by Guardian, ſhall be read againſt him as an Anſwer of one of full Age. *Secus* of an Infant.

It was agreed *per Cur.* that the Anſwer of a ſuperannuated Defendant, put in by Guardian, is to be read againſt him as an Anſwer of one of full Age, put in, in Perſon: And a Difference was taken between ſuch an Anſwer, and that of an Infant, put in by Guardian; becauſe an Infant improves and mends, as Lord Keeper ſaid, and therefore is to have a Day to ſhew Cauſe after he comes of Age; but the other grows worſe, and is to have no Day. *Preced. in Cha.* 229. Sir *Richard Levinge* againſt Lady *Caverly* and others.

Confeſſion by Anſwer ſufficient againſt the Party.

Confeſſing a Matter by Anſwer, is ſufficient Evidence againſt the Party. 2 *Vern.* 380.

In what Caſe a Defendant may charge and diſcharge himſelf by his Anſwer at the ſame Time.

A Bill was brought by Creditors, againſt an Executor for an Account of the perſonal Eſtate; the Executor ſet forth by Anſwer that there was one Thouſand one hundred and ſixty Pounds left by the Teſtator in his Hands, and that coming after to make up Accounts with the Teſtator, he gave a Bond for one Thouſand Pounds, and the reſt was given him as a free Gift for his Trouble in the Teſtator's Buſineſs, and no other Evidence in the Caſe, that the Money was depoſited, but the

Executor's own Oath; argued, that the Anſwer though it was put in Iſſue, ſhould be allowed; ſince there is the ſame Rule of Evidence in Equity, as in Law, and if a Man was ſo honeſt as to charge himſelf where he might roundly deny it, he ought to find Credit, where he ſwears in his own Diſcharge.

Ibidem. But it was anſwered, and reſolved by the Court, that when an Anſwer was put in Iſſue, whatever was confeſſed and admitted, need not be proved; but it behoved the Defendant to make out, by Proof, whatever was inſiſted on by Way of Avoidance; but with this Diſtinction, where the Defendant admitted a Fact, and inſiſted on a diſtinct Fact by Way of Avoidance, there he ought to prove the Matter of his Defence; becauſe it may be probable, that he admitted it out of Apprehenſion, that it might be proved; and therefore ſuch Admittance ought not to profit him ſo far as to paſs for Truth, whatever he ſays in Avoidance. But if it were one Fact, as if he had ſaid, the Teſtator had given him one hundred Pounds, it ought to be allowed, unleſs diſproved; becauſe nothing of the Fact charged is admitted, and the Plaintiff may diſprove the whole Fact as ſworn, if he can: But it was urged, that here the Probability was on the Defendant's Side, becauſe he did not give a Bond for this Sum, as for the Reſidue; but the Chancellor ſaid, there was ſome Preſumption

ſumption in that, but not enough to carry ſo large a Sum, without better Atteſtation. See the *Law of Evidence*, by a late learned Judge, 39.

Analogous to this, is a Man's own voluntary Affidavit, which is Evidence likewiſe againſt him; but then the Proceedings muſt be likewiſe given in Evidence, on which this Affidavit did ariſe; and the Reaſon why the Proceeding muſt be alſo given in Evidence is, to prove the Identity of the Perſon; for to prove an Affidavit ſworn, is not ſufficient, for the Party may be perſonated; therefore, to aſcertain this, the Occaſion of the Swearing muſt be proved; for it is not to be thought, or ſuppoſed, that any Man, without ſome Occaſion, would make an Affidavit. *Ibidem.*

A Man's voluntary Affidavit is Evidence againſt him, but the Proceedings, on which it did ariſe, muſt be given alſo in Evidence.

But there is great Difference between the Evidence of an Anſwer, and that of a voluntary Affidavit. *Ibidem.*

Difference between the Evidence of an Affidavit, and of an Anſwer.

Although Depoſitions may be read, without producing the Bill and Anſwer, yet an Anſwer cannot be given in Evidence, without producing the Bill; for without that, there does not in this Caſe appear to be a Cauſe depending, which muſt be preſumed, if Depoſitions be taken; but if there be Proof by the proper Officer, that the Bill hath been ſearched for, and cannot be found, there the

An Anſwer cannot be given in Evidence, without producing the Bill, unleſs the Bill be loſt.

the Anſwer hath been allowed to be read, without a Sight of the Bill: And this the Lord Chancellor *Brodrick* allowed, tho' the Loſs of the Bill was not proved by the proper Officer, but by a Clerk only, who wrote in the Office, and ſwore he had ſearched carefully with the Officer, and could not find the Bill. *Michaelmas* Term, 1714, in *Chancery*, *Roch* and his Wife againſt Adminiſtrators of *Howard*. *Ibidem*, 42.

Anſwer, how proved.

An Anſwer is proved, by ſhewing the Allegations in Court, by ſhewing the Bill which is the Charge, and the Anſwer, which is the Defence to the Bill; and this, in Civil Caſes, ſhall be intended to be ſworn, becauſe the Proceedings in ſuch Defence are upon Oath. *Ibidem.*

It is to be taken as an Oath, without further Proof than from the Proceedings in the Cauſe.

Now, ſince the Proceedings in any Court of Judicature within the Kingdom are good Evidence in other Courts, and the Proceeding in this Caſe are upon Oath, it follows, that in all Civil Caſes, the Anſwer is to be taken as an Oath, without further Proof than from the Proceedings in the Cauſe. *Ibidem*, 43.

But a voluntary Affidavit is not Part of any Cauſe, and therefore muſt be proved to be ſworn; it is like a Note or Letter.

But a voluntary Affidavit is not Part of any Cauſe in a Court of Juſtice, and therefore muſt be proved to be ſworn; for if you only prove it ſigned by the Party, it is no further Proof than as a Note or Letter; and as ſuch you may give

give it in Evidence, without more Proof. 3d *Mod.* 36. And this is one Difference between them.

The ſecond Difference between them is, that the Copy of an Anſwer may be given in Evidence; but not of a voluntary Affidavit, which hath no Relation to any Court of Juſtice, and therefore not intitled to public Credit; but, being a private Matter, muſt be itſelf produced as the beſt Evidence. 3d *Mod.* 116.

And then the Copy of an Anſwer may be given in Evidence; but the Affidavit itſelf muſt be produced; and why.

But the voluntary Affidavit of any Stranger can by no Means be given in Evidence, becauſe the oppoſite Party had not the Liberty of croſs-examining. *Sty.* 446.

But the Affidavit of a Stranger can by no Means be given in Evidence.

From what has been ſaid, it is evident, that a voluntary Affidavit is no Evidence between Strangers, becauſe there is no Croſs-examination; nor can there be, there being no Cauſe depending; and therefore ſuch Evidence cannot be admitted. *Ibidem.*

For there can be no croſs-examining.

That a Man's Anſwer in the Spiritual Court, or voluntary Oath before a Juſtice of the Peace, may be read as Evidence againſt him in *Chancery*, by Order. 1 *Vern.* 53. *Quære*, ſhould there be Notice?

A Man's Anſwer in the Spiritual Court, or Oath before a Juſtice of Peace, Evidence againſt him.

In

A ſingle Witneſs againſt Defendant's Oath, not ſufficient Evidence for a Decree; nor will the Court direct the Matter to be tried at Law.

In the Caſe of *Rawlinſon* againſt *Hutchins*, 2 *Vern.* 283, there being a Decree to an Account; and as to one Article of the Account, there being but a ſingle Witneſs againſt the Defendant's Oath, the Court declared it was not ſufficient Evidence to decree againſt the Defendant; and the Plaintiff having had the Benefit of the Defendant's Oath, they would not ſend it to be tried at Law, where one Witneſs is ſufficient, although it was inſiſted by the Defendant's Counſel, that it might be tried at Law. And, ſee 1 *Vern.* 161. 2 *Vern.* 283; *Proceedings in Chan.* 19; and 3 *Ch. Ca.* 223.——*Sed Quære*, if there be other Circumſtances to corroborate the Teſtimony of the Witneſs, as where the Anſwer of the Party appears to be notoriouſly falſified in other Particulars, or if manifeſt Acts of Fraud appear in the Caſe, on the Part of the Defendant? *Ayl.* 69.

But will direct a Trial, as to the Credibility of the Witneſs.

But in the *Law of Evidence*, by a late learned Judge, p. 94, it is ſaid, the Court may direct a Trial at Law to try the Credibility of the Witneſs; for that it is fit, where there is but one Witneſs only in Counter-balance to the Defendant's Anſwer, and on that one Witneſs the Decree is to be founded, that the Court ſhould inform their Conſcience of his Credibility, by a Trial at Law; otherwiſe any Profligate's Oath may overturn a Man's

a Man's Right, without any Opportunity to object to his Credibility: But when there are two Witneſſes againſt the Anſwer, then there is ſo great an Over-balance of Credibility, that the Plaintiff ought not to be delay'd in a Trial at Law.

A Settlement of a Jointure, actually made before Marriage, is an Evidence, that all the precedent Treaties and Agreements were reſolved into that. 1 *Vern.* 369.

Settlement of a Jointure before Marriage, Evidence, that all former Treaties were reſolved into it.

A third Mortgagee buys in the firſt, and brings a Bill to foreclоſe the ſecond, if he doth not pay both; he need not prove the Money actually lent on the third, the producing the Deed or Acquittance being ſufficient Evidence. 2 *Vern.* 279.

A third Mortgagee, buying in the firſt, need not prove the Money paid; an Acquittance for it will be ſufficient.

Where a Man had run away with a Caſket of Jewels, the injured Party's Oath was allowed as Evidence in *Odium Spoliatoris.* 1 *Vern.* 207, 208.

The injur'd Party's Oath allowed as Evidence *in Odium Spoliatoris.*

A ſlender Evidence will be ſufficient to prove Livery of Seizin, Attornment, Aſſent to a Legacy, or the new Publication of a Will. *Ibidem*, 330.

Several Caſes, in which ſlender Evidence is required.

The Evidence of a Servant, who was only nine Years of Age at the Teſtator's Death, but lived three or four Years afterwards in the Houſe, was allowed

Ibidem.

lowed to prove the Furniture then ſtanding, thirteen Years after, though ſhe had never taken any Memorandum of it. *Davey* and others againſt *Leys*, *Michaelmas* Term, 1728. *Moſeley*'s *Rep.* 72.

Legacy preſumed paid, after a Length of Time.

A Legacy is preſumed to be paid, after a great Length of Time. 2 *Vern.* 21.

Words no Evidence againſt a Deed.

Words are no Evidence againſt a Deed ſolemnly executed. 1 *Williams*, 482.

Exhibits proved by Depoſitions, to be ſhewn at the Hearing.

And, although all Exhibits, proved by the Depoſitions, may be read at the Hearing, yet they muſt be ſhewn forth in Court, if the Party will have any Benefit of them. *Treatiſe of Equity*, 123.

Parties and Privies muſt ſhew the original Deed. But Strangers may plead it, without ſhewing it.

And the Parties and Privies ought to ſhew the original Deed; for every Deed ought to prove itſelf, and be proved by others. But Strangers to the Deed, and who do nothing in Right of the Grantee, as Bailiff, or Servant, may plead the Patent or Deed, without ſhewing it. *Ibidem*, 124.

In what Caſes the Will itſelf is or is not required by the Court.

So a Will, which is the Plaintiff's Title, muſt itſelf be ſhewn to the Court, and not a Copy only; otherwiſe, where it is by Way of Circumſtance. *Ibidem.*

But

But where a Deed, or other Evidence, is ſuppreſſed, the Court will always intend a Title againſt him that ſuppreſſed it. But a Copy of a Deed, ſuppoſed to be ſuppreſſed, is not allowed, unleſs examined; nor even upon an Affidavit, that the Plaintiff had got it; but he ſhall be left to recover it at Law. *Ibidem.*

A Deed or other Evidence ſuppreſſed, the Court will always ſuppoſe a Title. But a Copy of the Deed not allowed, unleſs examined.

So formerly, although a Recital of a Leaſe, in a Deed of Releaſe, was good Evidence of ſuch Leaſe againſt the Releaſor, and thoſe that claim under him; yet, as to others, it was not, without proving there was ſuch a Deed, and that it was loſt or deſtroyed. *Ibidem.*——But now, by Statute 9 *Geo.* 2*d. Ch.* 5. *pars*, it is ſufficient Evidence of ſuch Leaſe, in all Caſes.

Recital of a Leaſe, in a Deed of Releaſe, is Evidence of the Leaſe.

And in Caſe of an Inrollment for ſafe Cuſtody, the Deed may be ſaid to be recorded; but it is no Record. And a Copy of it is no Evidence; nor is the Inrollment itſelf, without particular Circumſtances to ſupport it, or proving, that the original Deed was in the Defendant's Cuſtody, or Power, or accidentally loſt, *&c.* So determined in the Caſe of *Spence* againſt *Combe*, 2 *Vern.* 471. 591, and afterwards confirmed upon a Re-hearing. But an Iſſue at Law being directed, whether ſuch Deed was

How the Copy of a Deed enrolled ſhall be conſidered as Evidence here, or at Law.

was executed, upon the Trial, a Copy of the Deed was allowed to be read, and a Verdict for the Deed, though it was objected, it was not a Bargain and Sale, ſo did not operate by the Inrolment.

Ibidem. But where a Bargain and Sale is inroled, purſuant to the Statute, the Inrolment is a Record, ſo that a Copy of it may be read in Evidence, for no Raſure or Interlining ſhall be intended in a Record, for the Height and Solemnity of it, but the ſure Way is to exemplify it, under the Great Seal, or at leaſt under the Seal of the Court. See *the Law of Evidence*, by a late learned Judge, 71, 72.

Letters, Notes, and Records. No Letters or Notes not proved ſhall be uſed; but Records upon Motion, may be proved *viva Voce*, in Court. *Ibidem*, 53.

Huſband and Wife, contradicting. If Huſband and Wife contradict, the Depoſitions ought to be ſuppreſſed. *Ibidem*, and *Ch. Ca.* 302.

Shop Books, and Depoſitions in the Admiralty. Shop Books have ſometimes been read at the Hearing, and ſometimes Depoſitions in the *Admiralty*. 1 *Ch. Ca.* 306.

A Man's Book of Accounts. A Man's Book of Accounts is Evidence againſt him, not for him. 2 *Har. Ch. Pract.* 3d Edit. 53.

Pariſh

Pariſh Books, or Church Books, no Evidence. 2 *Har. Ch. Pract.* 53. Pariſh Books.

It is ſaid, that no Deed will be admitted to be read, on the Hearing in any Cauſe, where iſſue is not joined. No Deed to be read on the Hearing, except iſſue be joined.

By Statute 7 *Will.* 3, *Ch.* 12, *S.* 5. All Deviſes of any Lands, Tenements, or Hereditaments, deviſeable either by Force of the Statute, or by any particular Cuſtom, ſhall be in Writing; and ſigned by the Party ſo deviſing the ſame, or by ſome other Perſon in his Preſence, and by his expreſs Directions, and ſhall be atteſted and ſubſcribed, in the Preſence of the Deviſor, by three or more credible Witneſſes, or elſe they ſhall be void. How Wills, by which Lands, &c. are deviſed, are to be executed.

And by Sect. 6, no Deviſe in Writing of Lands, or Hereditaments, ſhall be revocable, otherwiſe than by ſome other Will or Codicil, in Writing, or other Writing declaring the ſame, or by burning, cancelling, tearing, or obliterating the ſame, by the Teſtator himſelf, or in his Preſence, and by his Directions and Conſent; but all Deviſes of Lands, and Tenements ſhall remain in Force, until the ſame be burnt, cancelled, torn, or obliterated, by the Teſtator, or his Directions in Manner aforeſaid; or unleſs the ſame be altered by ſome other Deviſes of Lands, &c. in Writing, not revocable, but by other Will, &c. in Writing.

Will or Codicil, in Writing, or other Writing of the Deviſor's, ſigned in the Preſence of three or more Witneſſes, declaring the ſame.

What Proof is requiſite, of the Execution of a Will of Land.

Declared by Lord Chancellor *Cowper*, in the Caſe of *Longford* againſt *Eyre*, that the proper Way of examining a Witneſs, to prove a Will, as to Lands is, that the Witneſs ſhould not only prove the executing the Will by the Teſtator, and his own ſubſcribing it, in the Preſence of the Teſtator, but likewiſe, that the reſt of the Witneſſes ſubſcribed their Names, in the Preſence of the Teſtator, and then one Witneſs proves the full Execution of a Will, ſince he proves that the Teſtator executed it, and likewiſe, that the three Witneſſes ſubſcribed it in his Preſence. 1 *Will. Rep.* 741.

If the Witneſs ſwear he ſubſcribed it in the ſame Room, and at the Teſtator's requeſt, held good, tho' not ſaid to be in the Teſtator's Preſence.

And his Lordſhip held, that the bare ſubſcribing the Will, by the Witneſs in the ſame Room, did not neceſſarily imply it to be in the Teſtator's Preſence; for it might be in the Corner of the Room, in a clandeſtine, fraudulent Way, and then it would not be a ſubſcribing by the Witneſs, in the Teſtator's Preſence; but, if it be ſworn by a Witneſs, that he ſubſcribed the Will, at the Requeſt of the Teſtator, and in the ſame Room, this cannot be fraudulent, and is ſufficient. *Ibidem.*

And

A Will, atteſted by two Witneſſes, not a good Appointment of an Uſe of Land, purſuant to a Power.

And in the ſame Caſe, his Lordſhip declared, that when a Power is given to appoint the Uſes of Land, by Deed or Will, or other Writing, in Nature of a Will, the Will muſt be intended ſuch a one, as is proper for the Diſpoſition of Land, conſequently, muſt be ſubſcribed by three Witneſſes, in the Preſence of the Teſtator; for this is within all the Inconveniencies, that the Statute of Frauds intended to prevent; and the other Words "in the Nature of a Will," mean the ſame as a Will, which muſt be ſubſcribed by three Witneſſes, in the Preſence of the Teſtator. 1 *Wil. Rep.* 741.

Of the Sufficiency and Diſability of a Witneſs.

In the Qualification of Witneſſes, Equity follows the Law.

AS it is not ſufficient to have a Right in Equity, unleſs we can make it appear, by ſome outward Proof to the Court; in Order to obtain Relief, it will be neceſſary to treat alſo of the Qualification of Witneſſes, and the Nature of Evidence and Proof: Not that it is meant, to ſpeak of theſe in general, but ſo far as they are uſed in a Court of Equity. Now in determining the Qualification of Witneſſes, Equity follows the Law; and it ſeems the Chancellor cannot do otherwiſe: And therefore, if a Man be rendered infa-

mous in Law, as by an infamous Judgment, or has not Diſcretion and Underſtanding, *&c.* his Teſtimony is not to be admitted. And the Caſes where the Party is concerned in Intereſt, though never ſo ſmall, have uſually prevailed, unleſs in ſpecial Inſtances. As 1ſt for the Neceſſity, where no other Evidence could poſſibly be had; as where a Man tears a Note, or a Goldſmith's Apprentice over-pays a Bill of Exchange. 2d. *In odium Spoliatoris*, the Oath of a Party injured ſhall be a good Charge on him who did the Wrong. 3dly. After great Length of Time; as in an Account of twenty Years ſtanding, he may prove by Oath, what he cannot prove otherwiſe. 4thly, Of ſmall Sums in an Account, as under 40s. he ſhall be diſcharged by his Oath, but he ſhall not charge another ſo; and this Rule extends no further, than for the Sum of 100l. and he muſt mention to whom paid, for what, and when; for in an Account he muſt prove the Particulars. 5thly, Where he has releaſed his Intereſt, though the Releaſe was ſealed in Court, while the Cauſe was trying. 6thly, *Particeps Criminis*, is admitted to prove Matters of Fraud, eſpecially, where what he proves is to his own Prejudice. 7thly, If one be made a Defendant, by Covin to take away his Teſtimony, and it appears upon the Evidence, the Judges may, and ought to allow him to be a Witneſs:

neſs: And this cannot be a general Rule, but every Caſe ſtands on its own Circumſtances, that is whether their Intereſt is ſo great, as it may be preſumed, to make them partial or not; and therefore Alms People, and Servants, are good Witneſſes; ſo it is uſual for a Legatee of a ſmall Legacy, as 5 s. to a private Perſon, or 5 l. to a Nobleman, to be admitted a Witneſs, for the Will. See *Treatiſe of Equity*, 122, 123.

Exceptions againſt Witneſſes are, if they gain, or loſe by the Succeſs of the Cauſe, or are under any Apprehenſion, or Imagination of gaining or loſing; a Witneſs ſhall not be admitted to ſwear in Exoneration of himſelf, but a Witneſs may ſwear againſt himſelf. Exceptions to Witneſſes.

When a Witneſs gains by the Succeſs of a Cauſe, if it ſhould be for the Party he is produced for, or if he loſes, if it goes againſt him he is produced by, then he is an incompetent Witneſs; but ſhould the Witneſs loſe, if the Party he is examined for, ſucceeds; he is a good Witneſs; for no Witneſs can be ſuppoſed to have any Temptation to ſwear contrary to the Truth, againſt his own Intereſt. And when a Witneſs is thus examined, as to his being intereſted or not, it is termed examining, as to *voire Dire*, which ſignifies to ſpeak, or ſay the Truth. *Voire Dire*, the Explanation of it.

Counſel or Attorney, may be examined as a Witneſs, but to be firſt examined.

A Counſel or Attorney, may be examined as a Witneſs, but he muſt be firſt examined, before any other Witneſs is examined.

To anſwer only as to their own Knowledge, not what was revealed by their Client.

If the adverſe Party will produce the Counſel or Attorney againſt his own Client, they ought to anſwer only what they know of their own Knowledge, not what was revealed to them by their Client, for a greater Regard ſhould be had to publick Juſtice, and to publick Good, than to private Intereſt.

In ſuch Caſe, the Counſel or Attorney, muſt take the General Oath, but may demur to an Interrogatory which would lead him to diſcover any Secret revealed to him, by his Client.

In the Caſe of *Magill* and his Wife, againſt *Savage* and others, in this Court, 3d *December*, 1741, Mr. *Trevor*, an Attorney for one of the Defendants, was produced as a Witneſs, by the Plaintiff, on a Commiſſion; he refuſed to take the General Oath adminiſtred to Witneſſes, imagining, that he would be thereby obliged to anſwer every Interrogatory exhibited to him, and by that Means, diſcloſe what was revealed to him by his Client; and inſiſted that the Commiſſioners ſhould ſwear him particularly, to anſwer only to ſuch Things, as were not revealed to him by his Client. Lord Chief Baron *Marlay* ſaid, Mr. *Trevor* ſhould have taken the General Oath, and that he might have demurred to ſuch Interrogatories, as led him to diſcover the Secrets of his Client, revealed to him by his

his Client, and the Court attached him, (although he made Affidavit, that what he did was through Ignorance,) as it might have been a manifeſt Prejudice to the Plaintiffs, in hindering them from ſetting down their Cauſe to be heard.

A Party intereſted, by releaſing his Right may be a Witneſs; but it muſt appear by Proof in the Cauſe, that ſuch Witneſs hath releaſed his Right. 2 *Vern.* 375. And the Depoſitions of a Witneſs, who was examined before the Hearing, and afterwards on the Account, having firſt releaſed his Right, were allowed to be read. 2 *Vern.* 473. *Preced.* in *Ch.* 234.

A Party intereſted, by releaſing his Right, may be a Witneſs.

A Perſon diſintereſted when examined, becoming intereſted afterwards, yet his Examination may be made Uſe of, though he ſhould afterwards become a Plaintiff in the Cauſe; but theſe Depoſitions cannot be made Uſe of at Law; for there is a Rule of Law, that where a Witneſs is living, and may be produced at the Trial, the Depoſitions of ſuch Witneſs ſhall not be read. 2 *Vern.* 669. 1 *Williams*, 288.

A Perſon diſintereſted when examined, and afterwards becoming intereſted, his Examination may be read.

But not at Law.

A Legatee of a ſmall Legacy, as has been ſaid before, may be a Witneſs for the Will. 1 *Vern.* 254. *Sed vid.* 2 *Vern.* 317, where it is ſaid, that none can be a Witneſs, where his Intereſt is

A Legatee of a ſmall Legacy, may be a Witneſs. *Sed Quær.*

concerned, be it never ſo ſmall or minute. But the Law in this Reſpect, has been much altered, by a late Statute, made in the 25th Year of the Reign of his preſent Majeſty, which ſee at the End of this Chapter.

Witneſs proved intereſted, no proof admitted to the contrary.

Where it is proved to the Court, that a Witneſs is a Party intereſted, no Proof is to be admitted, to ſhew him to be diſintereſted. 2 *Vern.* 464.

Wife not to be examined againſt her Huſband.

A Wife cannot be examined againſt her Huſband, unleſs in Caſe of extreme Neceſſity. 2 *Ch. Ca.* 39. 2 *Vern.* 79.

A Commiſſioner may be a Witneſs.

A Commiſſioner may be a Witneſs, but then he ought to be examined, before any other Witneſs be examined. 1 *Vern.* 369.

An Arbitrator or Umpire, may be a Witneſs.

In a Suit to ſet aſide a hard Award, the Arbitrator or Umpire, who made the Award, may be examined as a Witneſs. 1 *Vern.* 157, 158.

Executor may prove the Revocation of a Legacy.

An Executor may be admitted to prove the Revocation of a Legacy, though he has proved the Will. 1 *Vern.* 20.

A Grantee, a bare Truſtee, may prove the Deed.

A Grantee, when he appears to be a bare Truſtee, is a good Evidence, to prove the Execution of the Deed to himſelf. 1 *Williams*, 290.

A

A Member of a Corporation cannot be a Witneſs for the Corporation. 1 *Vern.* 254, and *per* Lord Keeper, a Corporation ought to have a Town Clerk, and under Clerks that are not Freemen, that they may be competent Witneſſes upon Occaſion. In 1 *Will.* 595, it is declared by Lord Chancellor *Parker*, that if a Corporation will examine any of their Members, as Witneſſes, they muſt (and ſo the Courſe is) diſfranchiſe them, and then they make Uſe of their Teſtimony. Note, the Method of diſ-franchiſing, is by an Information, in the Nature of a *Quo Warranto*, againſt the Member, who confeſſes the Information, on which the Plaintiff obtains Judgment to diſfranchiſe.

A Member of a Corporation cannot be a Witneſs for the Corporation.

But may, if diſfranchiſed.

Where there is a Diſpute touching Money, given to Pariſhioners, none of the Inhabitants of the Pariſh ought to be Witneſſes; becauſe they are intereſted, as being eaſed in the Poor Rates, 2 *Vern.* 317. But a Lodger, or Perſon that doth not pay to the Poor, may be a Witneſs, but he ſhall be intended a Houſekeeper, and liable to pay Pariſh Rates, unleſs the contrary be made appear. 1 *Williams*, 600.

An Inhabitant of the Pariſh, not to be a Witneſs, in a Suit touching Money, given to the Pariſhioners.

But a Lodger, that doth not pay to the Poor may.

But note, that croſs-examining a Witneſs by one Side, in any Matter, tending to the Merits, makes him a good Witneſs

Croſs-examining by one Side, makes a good Witneſs for the other.

Witneſs for the other Side, though otherwiſe liable to Exceptions. 1 *Vern.* 254.

Plaintiffs cannot be examined for each other, but Defendants may.

Plaintiffs cannot examine each other as Witneſſes in the Cauſe; becauſe, if the Cauſe miſcarries, the Plaintiffs will be liable to Coſts, and therefore their ſwearing is to exempt themſelves, and it is their own Choice, that they are made Plaintiffs, for without their Conſent they could not; but Defendants are forced into the Cauſe; and if their being made Parties, ſhould abſolutely invalidate their Teſtimony, it would be in the Power of any one who had a Mind to oppreſs another, to deprive him of his Defence, by making the moſt material Witneſſes Defendants in the Suit; and therefore, any of the Defendants to a Suit, may be examined as Witneſſes, either by the Plaintiff, or by a Defendant in the Cauſe, ſaving juſt Exceptions to their Credit; as may a *Prochein Amy*, for the ſame Reaſon. 2 *Ch. Ca.* 214. *Preced.* in *Ch.* 411. *Moſeley's Rep.* 312. And ſee 1 *Vern.* 230, where it is ſaid, that a Co-plaintiff, though but a Truſtee, cannot be examined as a Witneſs, for the other Plaintiff; and ſee *Moſeley's Rep.* 312, where it is ſaid, that the Court will not give a Defendant Liberty to examine a Plaintiff.

The Court will give the Plaintiff Leave to examine

Where a Plaintiff is obliged to make ſeveral Perſons Defendants, purely out of

of Form, the Court will give Leave to examine thoſe, who are not concerned in Intereſt, that is, who are not intereſted for the Plaintiff; and it would be hard, where the Plaintiff is obliged to make Parties not intereſted Defendants, that he ſhould loſe the Benefit of their Teſtimony; and therefore the Court, upon Motion of the Plaintiff's Attorney, will grant a general Order, for Liberty to examine ſuch a Defendant, ſaving Exceptions; and if the Defendant to be examined, be not a neceſſary Party, the Court, on ſuch Motion as aforeſaid, will give Leave to ſtrike him out of the Bill. But note, in this Caſe, the Court, on Motion of the Defendant's Attorney, will order the Plaintiff to pay the Defendant the Coſt of his Anſwer before he examines him; ſo ordered in this Court, in the Caſe of *Temple* againſt *Wilſon*, 26th *June*, 1750.

any of the Defendants, who are not intereſted for the Plaintiff.

But a Defendant, who is examined as a Witneſs for the Plaintiff, may demur to an Interrogatory, becauſe he is concerned in Intereſt in the Queſtion; for he ſhall not be obliged on Interrogatories, to prove the Plaintiff's Title againſt himſelf, although he muſt by Anſwer diſcover againſt himſelf; but then he has the Advice of Counſel. *Moſeley's Rep.* 196, 229. 2 *Ch. Ca.* 208.

But Defendant may demur to the Interrogatories, if concerned in Intereſt.

And

Though a Defendant cannot demur, but to Matter in the Bill, yet a Witneſs may for Matters *Debors* to the Interrogatory.

And though a Defendant cannot demur to a Bill, but for Matter appearing in the Bill itſelf, yet a Witneſs may demur for Matters *Debors*, to the Interrogatory, becauſe he has no other Way to relieve himſelf, but by Demurrer; but then the Facts muſt be verified by Affidavits. *Moſeley's Rep.* 229. *Sed vide* 1 *Vern.* 165.

But a Defendant examined, only as to the Execution of a Deed, ſhall not demur.

But if ſuch Defendant be Witneſs to a Deed, he ſhall be examined as to the Execution of it, but may demur to any other Queſtions. *Ibidem* 196. *Curſ. Canc.* 244. 284.

Cauſe may be ſhewn againſt a Defendant being examined *de bene eſſe*, after Hearing, if he be a Party intereſted.

Although it is an order of Courſe to examine a Defendant *de bene eſſe*, ſaving juſt Exceptions; yet when the Cauſe is heard, and referred to an Account, and it appears ſuch Defendant is a Party intereſted, it is proper to ſhew Cauſe againſt ſuch an Order, before the Witneſſes be examined. 1 *Vern.* 452.

Defendant examined as a Witneſs, his Teſtimony is concluſive; and no after Examination to convict him of Perjury.

If Defendant be examined as a Witneſs, Plaintiff muſt ſtand to his Depoſitions as concluſive; and where a Defendant is firſt examined, you ſhall not examine Witneſſes, to convict him of Perjury. 2 *Har. Ch. Pract.* 3d Edit. 25.

A

A Witneſs found to ſwear falſly in Part, his Teſtimony utterly rejected. *Dalton*, pa. 271. 2 *Har. Ch. Pract.* 55.

A Witneſs ſwearing falſly in Part, his Teſtimony rejected.

In all Caſes in Law and Equity, a Man and his Wife, are but as one Witneſs. *Ibidem.*

Man and Wife, but one Witneſs.

A Witneſs having finiſhed his Examination on an Account, it was moved to have him examined on the other Side, and allowed. *Ayl.* 47. 2 *Har. Ch. Pract.* 52.

A Witneſs examined on the Account, may be examined on the other Side.

Where a Witneſs's Depoſitions on the one Side, contradict his Depoſitions on the other, the Courſe is, to order him to attend the Court, to explain himſelf, otherwiſe his Depoſitions ſhall be ſuppreſſed. *Ibidem*, and *Ch. Ca.* 298.

A Witneſs examined on both Sides, and contradicting himſelf to attend to explain himſelf.

Truſtees ſhall not be examined, one againſt another. 2 *Har. Ch. Pract.* 53.

Truſtees not to be examined againſt each other.

Parties intereſted ſhall not be examined, to prove a Cuſtom. *Ibidem.*

Nor Parties intereſted, to prove a Cuſtom.

Witneſſes formerly examined in *Scaccario*, not to be re-examined in *Chancery*, as to the ſame Matter. *Ibidem*, and 1 *Ch. Ca.* 233.

Witneſs examined in one Court, not to be examined in another, to ſame Point.

If

Witneſs refuſing to be croſs-examined, his Depoſition ſuppreſſed.

If a Witneſs refuſe to be croſs-examined, the Court, on Motion, will ſuppreſs his *ex Parte* Depoſition. 2 *Har. Ch. Pract.* 54. and *Ch. Ca.* 322.

No Exceptions to a Witneſs, after Publication.

It is ſaid, that no Exceptions are to be taken to a Witneſs, after Publication hath paſſed in the Cauſe. *Ch. Ca.* 322. and 2 *Har. Ch. Pract.* 54. *ſed vide* pa. 812.

A Legatee of any Legacy, may be a Witneſs to a Will or Codicil, and it ſhall be only void, as to what concerns him.

Some Doubts having ariſen upon the aforeſaid Statute, 7 *Will.* 3 *Ch.* 12, who are to be deemed legal Witneſſes, within the Intent of the ſaid Act; therefore, for avoiding the ſame, it was enacted, by the 25th of *George* 2d. *Ch.* 11, "That if any Perſon ſhall atteſt "the Execution of any Will or Codi- "cil, made after the 24th Day of *June* "1752, to whom any beneficial Deviſe, "Legacy, Eſtate, Intereſt, Gift, or Ap- "pointment, affecting any real or per- "ſonal Eſtate, except Charges on Land, "for Payment of Debts, ſhall be there- "by given, ſuch Deviſe, *&c.*" ſhall ſo far only, as concerns ſuch Perſon, atteſting the Execution of ſuch Will or Codicil, or any Perſon claiming under him, be void, and ſuch Perſon ſhall be admitted as a Witneſs, to the Execution of ſuch Will or Codicil, notwithſtanding ſuch a Deviſe, *&c.*

And

A Creditor may be a Witneſs to a Will or Codicil, charging Lands with the payment of Debts.

And by Sect. 2. In Caſe, by any Will or Codicil, any Lands, Tenements, or Hereditaments, ſhall be charged with any Debts, and any Creditor whoſe Debt is ſo charged, hath atteſted, or ſhall atteſt the Execution of ſuch Will or Codicil, every ſuch Creditor, notwithſtanding ſuch Charge, ſhall be admitted as a Witneſs, to the Execution of ſuch Will or Codicil.

Where a Legatee ſhall be a Witneſs on Payment, Releaſe, or Tender and Refuſal.

And by Sect. 3. If any Perſon hath atteſted the Execution of any Will or Codicil, made on or before the 24th Day of *June*, 1752, to whom any Legacy or Bequeſt is thereby given, whether charged upon Lands or not, and ſuch Perſon, before he ſhall give his Teſtimony concerning the Execution of ſuch Will or Codicil, ſhall have been paid, or have accepted, or releaſed, or ſhall have refuſed to accept ſuch Legacy or Bequeſt, upon Tender made thereof, ſuch Perſon ſhall be admitted as a Witneſs, to the Execution of ſuch Will or Codicil, notwithſtanding ſuch Legacy or Bequeſt.

Legatee to be barred, after Tender and Refuſal, and after Acceptance ſhall retain his Legacy, though the Will ſhould be adjudged void.

And by Sect. 4. In Caſe of ſuch Tender and Refuſal, ſuch Perſon ſhall in no wiſe be entitled to ſuch Legacy or Bequeſt, but ſhall be barred therefrom. And in Caſe of ſuch Acceptance, ſuch Perſon ſhall retain to his own Uſe, the Legacy

Legacy or Bequeſt, which ſhall have been ſo paid, or accepted, notwithſtanding ſuch Will or Codicil ſhall afterwards be adjudged to be void, for Want of due Execution, or for any other Cauſe.

Legatee dying in Teſtator's Life Time, or before Payment and Refuſal, ſhall be a legal Witneſs.

And by Sect. 5. In Caſe any ſuch Legatee, who hath atteſted the Execution of any Will or Codicil, made on or before the 24th Day of *June*, 1752, ſhall have died in the Life Time of the Teſtator, or before he ſhall have received, or releaſed the Legacy or Bequeſt, ſo given to him, and before he ſhall have refuſed to receive ſuch Legacy or Bequeſt, or Tender made thereof, ſuch Legatee ſhall be deemed a legal Witneſs, to the Execution of ſuch Will or Codicil, notwithſtanding ſuch Legacy or Bequeſt.

The Credit of every ſuch Witneſs, to be ſubject to the Determination of the Court and the Jury.

By Sect. 6. Provided, that the Credit of every Witneſs, in any of the Caſes before mentioned, and all Circumſtances relating thereto, ſhall be ſubject to the Conſideration and Determination of the Court, and the Jury, before whom any ſuch Witneſs ſhall be examined, or his Teſtimony or Atteſtation made Uſe of, as the Credit of Witneſſes in all other Caſes, ought to be conſidered of and determined.

And

And by Sect. 7. No Perſon to whom any beneficial Intereſt ſhall be given, which is hereby enacted to be void, or who ſhall have refuſed to receive any ſuch Legacy or Bequeſt, or Tender made, or who ſhall have been examined, as a Witneſs, concerning the Execution of ſuch Will or Codicil, ſhall, after he ſhall have been ſo examined, demand or receive any Benefit from ſuch Intereſt, by any ſuch Will or Codicil, or Demand, or accept from any Perſon, ſuch Legacy, or Bequeſt, or any Compenſation for the ſame, under any Pretence.

No Perſon to ſecure or receive any Compenſation, *&c.* after he has been examined to a Will, or Codicil.

And by Sect. 8. In Caſe any Perſon ſhall give, ſecure, or agree to pay, or ſhall receive, or accept from any Perſon, any ſuch Legacy, or Bequeſt, or any Satisfaction, or Security for the ſame, contrary to the Intent hereof, every Perſon offending therein, and being thereof convicted, ſhall ſuffer Impriſonment for three Years. And every ſuch Security or Agreement, is declared to be void.

The Penalty for ſo doing.

And by Sect. 9. Nothing herein contained, ſhall extend to the Caſe of an Heir at Law, or of any Deviſee in a prior Will, or Codicil of the ſame Teſtator, executed and atteſted, according to the Statute 7 *Will.* 3. *cap.* 12. or any

Not to extend to any Heir at Law, in Poſſeſſion two Years before the firſt of *May*, 1751, or any Will contetted by the Heir, before that Time, *&c.*

Perſon claiming under them reſpectively, who has been in quiet Poſſeſſion, for two Years next preceding, the ſixth Day of *May*, 1751, as to ſuch Lands, whereof he has been in quiet Poſſeſſion, as aforeſaid: And nothing herein contained ſhall extend to any Will or Codicil, the Validity whereof hath been conteſted in any Suit in Law, or Equity, commenced by the Heir of ſuch Deviſor, or the Deviſee, in any ſuch prior Will, or Codicil, for recovering the Lands, *&c.* mentioned to be deviſed in any Will, or Codicil ſo conteſted, or for obtaining any other Judgment, or Decree relative thereto, before the ſaid ſixth Day of *May*, 1751, and which has been already determined, in Favour of ſuch Heir at Law, or Deviſee, or any Perſon claiming under them reſpectively; or which is ſtill depending, and has been proſecuted with due Diligence, but the Validity of every ſuch Will or Codicil, and the Competency of the Witneſſes thereto, ſhall be adjudged in the ſame Manner, as if this Act had never been made.

What ſhall be deemed Poſſeſſion, by ſuch Heir at Law.

And by Sect. 10. No poſſeſſion of any Heir at Law, or Deviſee in ſuch prior Will, or Codicil as aforeſaid, or of any Perſon, claiming under them reſpectively, which is conſiſtent with, or may be warranted under any Will or Codicil, atteſted according to this Act, or where the Eſtate deſcended to ſuch Heir at

at Law, till a future or executory Deviſe, by Virtue of any Will or Codicil, atteſted according to this Act, ſhould take Effect, ſhall be deemed to be a Poſſeſſion, within the Intent of the Clauſe herein laſt before-contained. *Brit. Stat.* 25 *Geo.* 2*d. Cap.* 5.

Where Want of Reputation, Integrity, or Capacity, ſhall exclude a Perſon from Teſtimony.

THE ſeveral Sorts of Perſons excluded from Teſtimony, for Want of Integrity, are ſuch as are ſtigmatized. There are ſeveral Crimes that ſo blemiſh the Reputation, that the Party is ever unfit to be a Witneſs, as Treaſon, Felony, Perjury, Forgery, and the like; becauſe he cannot be thought to have any great Regard for an Oath: And Preſumption of an Integrity and Veracity fails in ſuch Caſes; nay, ſuch Preſumption is the other Way.

What Perſons are excluded from Teſtimony.

The common Puniſhment that follows the *Crimen falſi* is the Pillory; and anciently no Perſon pillory'd could be a Witneſs; but now, unleſs it be *pro Crimine falſi*, as Perjury, Forgery, or the like, it will not take away the Evidence. 5 *Mod.* 15. 74.

A Perſon pillory'd for Forgery, or Perjury, &c. not to be a Witneſs.

A Statute Pardon reſtores the Credit.

A Perſon convicted of Felony, or Perjury, after a Statute Pardon, is a good Witneſs; and alſo, after Burning in the Hand, which amounts to a Statute Pardon. *Ray.* 370. 780. *Gold.* 88. *Sty.* 388. 1 *Vent.* 349. 2 *Hale*, 278. 2 *Hawk.* 364. 395.

If a King's Pardon reſtores the Credit.

But whether the King's Pardon reſtores his Credit, or no, has been a Queſtion. The King's Pardon takes away the Puniſhment, but doth not remove the Turpitude of the Crime. 1 *Bulſ.* 154. 11 *H.* 4. 41. 1 *Sid.* 51. 272.

Ibidem.

Others hold, the King's Pardon reſtores the Reputation that it takes away, *Pœnam & Culpam in foro humano*; for the Loſs of Reputation is Part of the Puniſhment, and the Pardon takes off the whole Puniſhment: So that the Law is now held to be, that, for Perjury at Common Law, the Pardon takes off every Part of the Penalty; but Perjury on the Statute the King cannot pardon at all. *Hob.* 83. 288. *Moor*, 872. 2 *Hale*, 278. 2 *Hawk.* 364.

What Pardon ſhall reſtore a Perſon to his Credit, who hath been convicted of a Crime, that would have excluded him from his Teſtimony as a Witneſs.

In the Caſe of *Newell* againſt *Maſſy* in this Court, one *Richard Powell*, who was convicted of Forgery, was admitted as a Witneſs, and was examined *viva Voce*: The Caſe was ſhortly thus:

Maſſy

Maſſy brought an Ejectment at Law, and *Newell* defended by a Deed under the Defendant's Grandfather; upon that Trial, *Powel*, being a ſubſcribing Witneſs, denied his Hand; ſo *Maſſy* got a Verdict. *Newell* filed his Bill in this Court, for an Injunction, and proved thirty Years Poſſeſſion going along with the Deed, and the Hand-writing of two Witneſſes, who were dead, and *Powel*'s Hand alſo; and procured an Order for having *Powel* examined, *viva Voce*, on the Hearing in the Court, and offered to read the Proof of his Hand-writing. The Defendant would have examined *Powel*, and, in Order to make him a competent Witneſs, produced a Charter of Pardon granted to *Powel*; ſo the Matter was debated, and the Diſtinction was thus:—If *Powel* had been convicted on the Statute of Queen *Elizabeth*, the Pardon would not have made him *Rectus in Curia*; but in Regard he was found guilty by the Common Law, the Pardon reſtored him to his Credit, and took away the *Pœnam* as well as the *Reatum*, though it was *Crimen falſi*; ſo the Court admitted him to be ſworn, who, on his Examination, denied his Hand, and an Iſſue at Law was directed to try the Deed. Authorities produced by Mr. *Jocelyn*, to ſhew that the Pardon made *Powel* a competent Witneſs, were *Hob.* 81. 88. 1 *Vent.* 349.

Raym. 379. 387. 2 *Sid.* 52. *Moor*, 872.

The Hand-writing of a Witneſs found guilty of Perjury, proved by a Witneſs.

In the Caſe of *Hodder* againſt *Lewis* and his Wife, in this Court, *John Shaw*, who was the only ſurviving Witneſs to a Will, denied his Hand; he was found guilty of Perjury in that Particular, and on a ſubſequent Hearing, his Hand was admitted to be proved by Witneſſes.

RULE. Of exhibiting Articles to the Credit of a Witneſs.

By a Rule, made the 3d of *June*, 1712, if either Party has a Mind to examine, touching the Credit or Reputation of any of the Witneſſes, in ſuch Caſe, the Court, upon Counſel's Motion, and upon Notice given, will give Leave to either Party to exhibit Articles to the Credit of a Witneſs; but by ſuch Order, the Party is only at Liberty to examine in general to the Reputation of the Witneſs, who is to be named in the Order; for the Court will not give Leave to examine into any particular Facts, or Crimes, committed by ſuch Witneſs.

If they may be before Publication.

In the Caſe of *Kenny*, Executor of *Higley*, againſt the Attorney-General, and others, in this Court, *Trinity* Term, 1752, a Motion was made, on Behalf of the Attorney-General, before Publication, to exhibit Articles to the Credit of Witneſſes examined for the Plaintiff: But the Counſel for the Defendant oppoſed

poſed the Motion; for, that it was irregular before Publication, as that after Publication it may appear, the Witneſſes had not depoſed any Thing material, and may prevent an unneceſſary Expence and Trouble to the Parties, and alſo prevent the throwing an Aſperſion on the Credit of Perſons, when there may not be the leaſt Occaſion for it. But it was inſiſted upon, on the other Side, that, by the Practice of the Court, ſuch Examination may be as well before as after Publication; that it may be fatal to refuſe it, as the Witneſſes may die before Publication paſſed; and it would be ſevere to attempt to impeach the Credit of a Man after his Death. Whereupon the Court ordered Precedents to be ſearched for in the Court of *Chancery*, and this Court; and it appearing, that in both Courts ſuch Articles had been exhibited, as well before as after Publication; but no Precedent appearing, where the Matter had been fully debated, and the Motion being again brought on by the Defendant, it was granted without any Oppoſition from the Counſel for the Plaintiff.—— Some of the Caſes in this Court, produced on the Motion, were *Teeling* and others againſt *Dillon* and others, 11th *November*, 1735. *Tobin* againſt *Bird*, 23d *July*, 1736. and *Higley* againſt *Darling*, 27th *June*, 1749. See *Bunb. Rep.* 46, *Boning* againſt *Sprot*.

The Proceedings on ſuch Examination.

As ſoon as the Articles to the Credit of a Witneſs are ready, the Court is to be moved for Liberty to exhibit them; then they are to be filed, and Notice thereof to be given to the adverſe Party. They are to be ſigned by the Party, as well as by the Counſel and Attorney; and the Interrogatories are to be drawn on theſe Articles, on which you may examine in Town, or by Commiſſion.

RULE. Notice to be given, on exhibiting Interrogatories to invalidate the Credit of Witneſſes.

By the 38th general Rule, no Interrogatories are to be exhibited to invalidate the Credit of any Witneſs, without firſt giving four Days Notice thereof to the Attorney of the other Party, before they examine on ſuch Interrogatories.

After Publication you may examine to the Competency as well as to the Credibility of a Witneſs.

It has been held, that after Publication, you may examine as to the Credibility, but not as to the Competency of a Witneſs. But in the Caſe of *Needham* againſt *Smith*, it was determined, by the Lord-Keeper, aſſiſted by two Judges, that this was a Diſtinction, without Colour of Reaſon; and that if you may examine to the Credibility, which goes to the Part, you may certainly examine to the Competency, which goes to the Whole, and totally deſtroys his Evidence. 2 *Vern.* 464.

And

And if, after the Hearing, a Witneſs is convicted of Perjury, you may take Advantage of it upon a Re-hearing. 2 *Vern.* 464.

Witneſs, after Hearing, convicted of Perjury, Advantage may be taken of it on a Re-hearing.

Conviction of Perjury, without Judgment, cannot weaken the Credit of the Witneſs; for then the Allegations in the Indictment are ſuppoſed to be defective, and one cannot be intended to make competent Proofs on inſufficient Allegations. *Raym.* 32. 1 *Sid.* 51.

Conviction of Perjury, without Judgment, not ſufficient to weaken the Credit of a Witneſs.

Infidels cannot be Witneſſes, becauſe under none of the Obligations of our Religion; and where the binding Force of an Oath ceaſes, the Reaſons and Grounds of Belief are abſolutely diſſolved. 2 *Hawk. P. C.* 434. *Co. Lit.* 6.

Infidels not allowed as Witneſſes.

But Jews are allowed, when ſworn on the Old Teſtament, which is Part of our Belief; but theſe are totally excluded by the Civil Law, which ſays, Jews and Hereticks ſhall not be admitted againſt the Faithful. 2 *Hale's Pl.* 52. 279.

But Jews are, when ſworn on the Old Teſtament.

Perſons excommunicated cannot be Witneſſes, becauſe by the Law of the Church they are excluded human Converſe; nay, her Laws go ſo far as to excommunicate thoſe who converſe with them, and thoſe who are excluded out of the Church, are ſuppoſed to be under

Perſons excommunicated cannot be Witneſſes.

der no influence of Religion. 2 *Bulſ.* 155.

But Perſons outlawed may be Witneſſes.

But Perſons outlawed may be Witneſſes, for that has no Influence on their Credit, and is a Puniſhment of them only in their Properties, and not in the Loſs of their Reputation. See the *Law of Evidence*, by a late learned Judge, 103. *Co. Lit.* 6.

But not Perſons who want Underſtanding.

Perſons excluded for Want of Underſtanding, are Idiots, Madmen, and Children.

In what Caſes Children are admitted as Evidence.

Children under the Age of fourteen are not regularly admitted as Witneſſes, yet they ſwear Allegiance in the Court Leet at twelve. The Law fixes no Time wherein they are to be excluded from Evidence, but their Underſtanding is to be enquired into, and judged of, by queſtioning them. *Ibidem.* and 1 *Hale*'s *Pl. Cr.* 634, 635. 2 *Hale*'s *Pl. Cr.* 278 to 285.

All Perſons who are good Witneſſes at Law, are good Witneſſes in Equity.

Upon the Whole, all Perſons who are good Witneſſes at Law are good Witneſſes in Equity; for the Rule of Evidence is the ſame in Equity as at Law. See 1 *Hale*'s *Pl. Cr.* 634, 635. 2 *Hale* 278 to 285. 1 *Inſt.* 6. *B.* 2 *Hawk. P. C.* 434. 1 *Brownl.* 47. *Co. Lit.* 6. The *Law of Evidence*, by a late learned Judge, 86 to 105.

Of

Of parol or collateral Evidence, and where it ſhall be admitted to explain, confirm, or contradict, what appears on the Face of a Deed, or Will.

RECORDS when perfect, for avoiding Infiniteneſs which the Law abhors, eſtop all Parties and Privies from contradicting any Thing apparent in the Record, and a Record cannot be confeſſed and avoided; as to ſay that he was not a Perſon able, *&c.* for then every Record might be ſo avoided by a nude Averment: But to make an Averment which ſtands with the Record, and which does not contradict any Thing apparent in the Record, to the Judges, by Conſtruction of Law upon the Words, the Law well admits and allows of. *Treatiſe of Equity*, 124.

Records, eſtop all Parties and Privies from contradicting any Thing apparent in them.

But an Averment which ſtands with the Record is allowed of.

So a Deed indented, is the Deed of both Parties, though they were the Words of but one, for both Seal it, and of Conſequence are eſtopped by it, *viz.* in all the material and eſſential Parts, without which, it would not be good, otherwiſe of a Patent or Deed Poll; becauſe the Eſtoppel there is not mutual, as it ought to be. *Ibidem.*

A Deed indented is the Deed of both Parties, though they were the Words of one.

Otherwiſe of a Patent or Deed Poll.

But to a Deed they may plead, *non eſt factum*, *& pari Ratione*, may confeſs and

But a Party may plead to a Deed, or confeſs, or avoid it.

and avoid it, as by Coverture, or the like: And although a Deed is *prima Facie*, an Eſtoppel, yet they may plead, or aver any Matter of Fact, which ſtands with the Words of the Deed. But no Averment can be taken againſt the Judgment of Law, which appears to the Judges upon View of the Deed; for Matter of Fact is to be tried by the Jury, but Matter of Law by the Judges only. *Treatiſe of Equity*, 125.

But no Averment againſt the Judgment of Law, which appears on View.

Eſtoppels by Record, relieved againſt in Equity.

But in Caſe of Eſtoppels, Verdict againſt the Truth, or the Law, being founded upon an untrue Preſumption, *Chancery* will relieve. And although ſuch Aſſurances as are uſed for the common Repoſe of Men's Eſtates, Equity will not draw in Queſtion (for a Fine with Proclamations ought after five Years to be a Bar in Conſcience, as it is in Law; ſo ſhall it be of a common Recovery for docking the Entail) yet, if a Fine is unfairly obtained, Equity will order a Reconveyance, and the Court, where it is acknowledged, will vacate it for Error, or Irregularity. *Ibidem.*

A Judgment at Law, not pleadable in Bar to a Suit in Equity.

Neither is a Judgment at Law to be pleaded in Bar, to a Suit in Equity, notwithſtanding the Statute of 4 *H.* 4. ch. 23, becauſe that Statute meant only to reſtrain ſuch Juriſdiction, as did take upon it to reverſe the Judgment, as Error

Error and Attaint do, which the *Chancery* never pretended to, but leaves the Judgment in Peace, and only meddles with the corrupt Conſcience of the Party. And although it is ſaid that the Common Law uſed ſome Power, to reſtrain ſuch Examinations directly before any Statute made; yet theſe ſeem rather to examine the Manner, than the very Matter and Subſtance of the Thing adjudged. *Treatiſe of Equity*, 125.

So in natural Juſtice, Deeds and Writings are conſidered only as Memorials of the Contract, not as a ſubſtantial Part of them; and therefore any other Proof is as well, and the Eſtoppel will not in Equity be regarded againſt the Truth: As if a Covenant be general, that he was lawfully ſeized, and there is Proof, that it was declared upon ſealing, that he ſhould undertake for his own Act only, he ſhall be relieved. *Ibidem.*

So Eſtoppels by Deed are relieved againſt in Equity.

So if in the Purchaſe of a Manor a Copy-hold being a little before eſcheated, was not intended to paſs in Demeſne, and was left out of the Particular; yet the Conveyance was ſufficient to paſs it at Law, the Vendor ſhall be relieved in Equity. *Ibidem.*

Ibidem.

So where a Leaſe for Years was made in Truſtees, precedent to the Wife's Settlement, only to protect the Wife's Eſtate

Ibidem.

Eſtate againſt the Violence of the Times, and not to exclude the Huſband, but the Sequeſtrators; upon Proof of this, by one ſingle Witneſs of an undoubted Reputation, the Nature of the Caſe requiring Secrecy, *Chancery* will relieve againſt the Truſt expreſſed in the Deed. *Treatiſe of Equity*, 126.

A Miſtake by a Steward in the Surrender of a Copy-hold, the Court at Law will admit an Averment of it.

And in Caſe of a Surrender made by a Steward of a Copy-hold, if there be any Miſtake there, that is only Matter of Fact, the Courts at Law will in that Caſe admit an Averment, that there was a Miſtake, *&c.* either as to the Lands or Uſes. *Ibidem.*

No parol Proof.

As for a Teſtament proved *Sub Sigillo Epiſcopi*, it is no Eſtoppel; yet the laſt Will of a Man is looked upon as the laſt ſerious Act of his Life, as to the Diſpoſition of his Eſtate, and muſt be admitted ſufficient to repeal all former Wills; and much more to controll all parol Declarations. *Ibidem.*

Ibidem.

And the conſtant Rule of Law has been to reject all parol Proof, brought to ſupply the Words of a Will, or to explain the Intent of the Teſtator; and that nothing *Debors* ſhould be averred, is the expreſs Reſolution in Lord *Cheyney*'s Caſe, 5 *Coke*, 67. And this Rule has been thought neceſſary to be adhered to, not only on Account of the Statute of

of Frauds and Perjuries, which was made to prevent Perjury, Contrariety of Evidence, and Uncertainty; but becauſe little Regard ought to be had to the Expreſſions of the Teſtator, either before or after the making his Will; becauſe poſſibly thoſe Expreſſions might be uſed by him on Purpoſe to controul or diſguiſe what he was doing, or to keep the Family quiet, or for other ſecret Motives and Inducements, which cannot after his Death be found out. It is to be conſidered, therefore, as it ſtands upon the Will alone, and would have been ſo, even before the making of the Statute of Frauds and Perjuries; for by the Statute of Wills, by which Men are enabled to make Wills, and deviſe their Lands, it muſt be a Will in Writing; and, ſhould parol Proof be admitted, it would introduce a mighty Uncertainty, and an infinite Inconvenience. *Treatiſe of Equity*, 126.

Of the Difference taken between Evidence offered to the Court, and Evidence offered to the Jury.

But this Rule has received a Diſtinction, which has greatly prevailed, *viz.* between Evidence offered to a Court, and Evidence offered to a Jury; for in the laſt Caſe no parol Evidence is to be admitted, leſt the Jury might be inveigled by it; but in the firſt it can do no Hurt, being to inform the Conſcience of the Court, who cannot be biaſſed or prejudiced by it; and, therefore, tho' ſuch an Averment could not be admitted,

ted, where it was to make a Party a Title; yet, where it was only to rebut an Equity, it might; as where *A.* charged his real Eſtate with Payment of his Legacies and Debts, and deviſed his Eſtate ſo charged to the Defendant his Nephew, and made the Plaintiff, his Wife, Executrix, Proofs may be admitted, that it was *A*'s Intention that ſhe ſhould have the perſonal Eſtate clear of the Debts; and if it were taken from her by the Creditors, ſhe ſhould come in as a Creditor on the real Eſtate. *Treatiſe of Equity*, 126. 2 *Vern.* 98. 252. 337. 625.

Ibidem. So, where a Money Legacy, given to an Executor, ſhall exclude him from the Surplus, the Preſumption being that the Teſtator did not intend him all, and ſome; yet ſuch Preſumption may be ouſted, or taken away, by a Proof of the Teſtator's Intention, that his Executor ſhould have the Surplus, or, that his next of Kin ſhould not have it, eſpecially if a ſpecific Legacy were given to the next of Kin; for one may aver the Truſt of a perſonal Eſtate. *Treatiſe of Equity*, 126.

Ibidem. So the Conſtruction of making a Gift a Satisfaction, has, in many Caſes, been carried too far; it is therefore reaſonable, in ſuch Caſes, to admit of parol Proof as to the Teſtator's Intention.

But Courts of Equity are of late However, the later Reſolutions have been

been very cautious of admitting parol Evidences, becauſe they encourage Suits and Litigations, and introduce the very Miſchiefs that the Statute intended to prevent. *Treatiſe of Equity*, 127, and 2 *Vern.* 593.

very cautious in admitting parol Evidences.

But although no Proof ought to be received, to ſupply the Words of a Will, ſince the Will that muſt paſs the Land muſt be in Writing, and muſt be determined only by what is contained in the written Will; yet there can be no Hurt in admitting collateral Proof, to make certain the Perſon or the Thing deſcribed; as where *A.* deviſed to *B.* Lands of ſixty Pound per *Annum*, paying one hundred Pound, which he by Bond owed *J. N.* it happened, that the hundred Pound by Bond was not due to *J. N.* but to *S. H.* but the Perſon who drew the Will having ſworn, that the Teſtator intended the Debt to *S. H.* the Deviſee of the Lands ſhall be liable. *Treatiſe of Equity*, 127.

No Hurt to admit collateral Proof to aſcertain the Perſon or Thing deſcribed in a Will.

So to aſcertain the Thing, notwithſtanding the Statute of Frauds; for it neither adds to nor alters the Will, but only explains which of the Meanings ſhall be taken. Yet ſome have doubted, whether they could read Witneſſes on a Will of Lands by the Statute, though it were only in Preſervation of the Deviſe: But to be ſure, if the Deviſe would admit

Ibidem.

mit of any Senſe, they could not be read. *Treatiſe of Equity*, 127.

Collateral Proof was allowed, to make certain a Perſon or Thing deſcribed in a Will. 2 *Vern.* 517. 593. But it was in Caſe of a perſonal Fortune.

Ibidem.

So, where one having two Sons, both named *John*, deviſed Land to his Son *John*, there parol Proof was admitted, to ſhew which *John* the Father meant; and yet *Additio probat Minoritatem.* See 5 *Coke*, 68, Lord *Cheyney*'s Caſe. So, if there were two Perſons, both named *J. S.* of *Dale*, and I ſhould deviſe my Land to *J. S.* of *Dale*, parol Evidence would be admitted in ſuch Caſe, which *J. S.* of *Dale* was intended by me. So where one ſeized in Fee, as Heir of the Mother's Side, deviſes Lands, after Payment of ſeveral Annuities, to the Teſtator's right Heirs of the Mother's Side for ever, parol Evidence admitted, to prove which Heir was intended, whether the Heirs of the Mother's Mother's Side, or the Heir of the Mother's Father's Side. 2 *Williams*, 136.

An Eſtate charged with an Annuity upon parol Evidence.

But one deviſes Lands to his Brother, and makes him Executor, and wills, that his Brother, out of the perſonal Eſtate, and Half a Year's Rent of the real Eſtate, ſhall pay his Legacies, and gives an Annuity to his Nephew;

Nephew; upon parol Evidence, that the Brother promiſed the Teſtator to pay the Annuity, or otherwiſe he would have charged his real Eſtate therewith, the real Eſtate was decreed to be charged with the Annuity. 2 *Vern.* 506.

Parol Proof admitted to ouſt an Implication, or rebut an Equity, in Relation to a perſonal Fortune.

One by Will gives his Executor an expreſs Legacy, and makes no Diſpoſition of the Surplus; the Court will admit of parol Evidence, to ſhew the Intention of the Teſtator; and if proved, that the Teſtator intended the Surplus to the Executor, he ſhall have it, notwithſtanding his expreſs Legacy, it being to ouſt an Implication or Rule in Equity. 2 *Vern.* 648. 675. 736. See alſo 1 *Williams*, 116, where it is ſaid, that although it be dangerous to admit of parol Proof, where there is a Will in Writing, however, in Relation to a perſonal Fortune, the Court will allow of Proofs and Averments; ſo that if there be plain and indiſputable Proof of the Teſtator declaring and intending, that his Executor ſhould have the Surplus, this will intitle him thereto, even though ſuch Proof was but parol Proof, and although he had an expreſs Legacy; for the Executor has a legal Title to the Surplus: And this parol Proof would be only to rebut an Equity, ariſing by Implication to the next of Kin, by Reaſon of the expreſs Legacy given to the Executor. See 2 *Williams*, 210.

Parol Proof admitted to explain a Truſt.

One makes his Will, and *A. B.* and *C.* his Executors in Truſt, and gives them twenty Shillings a-piece for a Remembrance above their Charges; parol Proof was admitted to prove, that this was a Truſt for the Wife only. 2 *Vern.* 99.

Parol Proof not in any Caſe admitted to alter the Conſtruction of a Will, and in what Caſes only it ſhall be admitted.

In the Caſe of *Brown* againſt *Selvil*, and *e contra*, in *Talbot*'s *Reports*, 240 to 243, *Michaelmas* Term, 1734, it was determined, that parol Proof ſhall not in any Caſe be admitted, to alter the Conſtruction of a Will, or to make the Conſtruction againſt the plain Words of a Will; and his Lordſhip declared, that none of the Caſes, where parol Evidence hath been admitted, have gone ſo far as either of theſe; the fartheſt then is to rebut an Equity, or reſulting Truſt: The parol Evidence in theſe Caſes tended to ſupport the Intention of the Teſtator, conſiſtent with a written Will. And upon an Appeal to the Houſe of Lords, the Decree was affirmed, and the Lords would not allow the parol Evidence to be read, nor even the Reſpondent's Anſwer, as to theſe Matters.

And where the Bequeſt is not Subſtantive in Writing, it is void.

And it is a ſettled Rule in the Court of *Chancery*, that although they will read parol Proof, to fortify any natural Conſtruction that ariſes from the Words of the Will; yet they will never read any

any parol Proof, to make any Alteration in the Will, or Addition to it. And if the Bequeſt cannot be made out, but by the parol Depoſition of the Witneſſes, there being only initial Letters for the Names of the Legatees, as it is not ſubſtantive in Writing, it is not a written but a nuncupative Will; and therefore, without the Circumſtances required by the Statute, is void. *Treatiſe of Equity*, 127.

Parol Evidence when it concurs with a Conveyance, and is is only to rebut a pretended reſulting Truſt, ſhall be admitted to ſhew the Intention of the Party. 1 *Williams*, 113.

Parol Evidence to rebut a pretended reſulting Truſt, when it concurs with the Deed.

Of the Diſcovery of Evidence, and where, for whom, and againſt whom, it lies.

IN the Law of Nature, when Deeds and undeniable Inſtruments cannot be produced, they muſt then give Judgment againſt the Defendant, according to the Teſtimony of Witneſſes, or with Conſent of the other Party, give him his Oath, I ſay, with the Conſent of the other Party, for elſe, in the Liberty of Nature, no Man is obliged to put the Iſſue of his Cauſe upon another Man's Conſcience. And in the Civil

Diſcovery where it lies.

Law, the Judge *ex Officio*, if he ſaw Occaſion, might put the Defendant to his Oath, or the Party intereſted might demand it; and this was deciſive between the Parties, and their Repreſentatives, but did not hurt a third Perſon. So in *Chancery* though Witneſſes are examined, yet you may afterwards examine the Defendant. *Treatiſe of Equity*, 128.

Bill of Diſcovery of Evidences, in what Caſes.

So where a Perſon has a Demand againſt another, but cannot aſcertain it, or ſupport his Caſe, without the Confeſſion of ſome Matter, that reſts within his Knowlege only, againſt whom he ſeeks relief; in ſuch Caſe, if the Plaintiff has commenced, or intends to commence an Action at Law, for Recovery of his Demand, he may prefer his Bill in a Court of Equity, to Aid his Suit, and for Diſcovery of ſuch Matter, as he apprehends will entitle him to recover at Law. *

This

* I have ſeldom ſeen any great Advantage gained by Plaintiffs, from the Anſwers to theſe Bills, on Trials at Law; for the whole Confeſſion is to be taken together, and the Plaintiff ſhall only take what makes againſt the Defendant, in his Anſwer, and leave out what makes for him. It is to be read as the Senſe of the Party himſelf, and it is to be taken in this Manner; it is to be taken entire and unbroken; wherefore as Defendants generally introduce ſome Matters in their Anſwers, by Way either of Juſtification, or of Qualifying

This Bill alſo lies in the Nature of a croſs Bill, againſt the Plaintiff in the original Cauſe, for diſcovery of Evidence only. See Title *Croſs Bill.* Ibidem.

And a Bill lies there for the Diſcovery of an Eſtate, by one who had a Title to it; as by the Patentee of the Goods of a Felon, or of one outlawed; for Outlawry is in Nature of a Gift, or Judgment to the King. *Treatiſe of Equity*, 128. For the Diſcovery of an Eſtate, by one who has a Title.

So where *A.* obtained Judgment againſt *B.* and the Defendant to defraud him of the Benefit of it, aſſigned his Eſtate to Truſtees, for himſelf; *A.* may have a Diſcovery, though it is objected that this is in the Nature of a foreign Attachment, and that there could not be a Diſcovery, of a Man's perſonal Eſtate, in his Life-time; but if the Plaintiff in ſuch Caſe has not taken out Execution, it will not be allowed. And it ſeems agreed, it would not lie againſt the Debtor himſelf; nor to have a general Diſcovery from a third Perſon, Bills to diſcover Goods in a third Perſon's Hands, muſt be after Judgment and Execution taken out.

lifying, it is often more prudent, for Plaintiffs not to introduce them at all.

But it is not ſo in Equity upon a croſs Bill, unleſs the Plaintiff fails to reply, whereby the Defendant is deprived of an Opportunity, of examining Witneſſes to prove his Anſwer. See 2 *Vent.* 72. 3 *Mod.* 259. *Carth.* 79. 3 *Williams*, 237.

but only for particular Things, ſo adjudged upon a Demurrer. 1 *Vern.* 399, *Angel* and *Draper*. But where the Bill is to diſcover particular Goods, it will lie, although Execution be not taken out. See *Bac. Equ. Ca.* 132.

Unleſs it be to diſcover particular Goods.

So where a Fire happens in a Man's Houſe, and burns his Neighbour's likewiſe, although he is liable to Damages at Law, yet the Plaintiff in ſuch Caſe ſhall not be aſſiſted in Equity; for though the Law gives an Action, yet it does not ariſe out of any Contract, or Undertaking of the Party. *Treatiſe of Equity*, 128.

So a Diſcovery doth not lie in Equity, where the Action at Law is for a Matter that doth not ariſe from the Contract of the Party.

But the Caſe is not parallel, where a Lighter is overſet by Negligence of the Lighter Man, or a Ship takes Fire, by the Negligence of the Maſter, or Ship's Crew, theſe come within the Reaſon of any common Carrier, and therefore the Plaintiff ſhall have a Diſcovery, to enable him to bring his Action. 2 *Vern.* 442.

But it will lie where there is a Contract expreſs or implied.

Yet a Plaintiff is not admitted to a Diſcovery, without verifying his Title at Law, ſo that if there be a full Anſwer given to the Thing in Demand, till that be tried the Defendants are not bound to diſcover; as in a Bill for Tythes, if they plead the Statute of 13th *Elizabeth*, *Cap.* 20, againſt Non-reſidence, in Bar; or in Caſe of Tythes of

But a Plaintiff ſhall not be admitted to a Diſcovery, without verifying his Title at Law.

of Conies by Cuſtom, if they deny the Cuſtom: And the rather becauſe the Demand was againſt common Right; and if it ſhould be otherwiſe, the Defendant, by a feigned Suggeſtion, might be forced to diſcover any Thing. But if in that Caſe, the Matter be found againſt the Defendant, he ſhall after be examined upon Interrogatories. But where there is no ſuch great Inconvenience, as upon a Bill againſt an Executor, to diſcover Aſſets, he muſt Anſwer, though he denies the Debt; becauſe it concerns the Act of another. *Treatiſe of Equity*, 129.

An Executor muſt Anſwer a Bill to diſcover Aſſets.

A Bill was brought, to diſcover who was Owner of a Wharf and Lighter, to enable the Plaintiff to bring an Action for the Damages his Goods ſuſtained, by the Lighter's being over-ſet, by the Negligence of the Lighter-man; to which the Defendant demurred, but the Demurrer was over-ruled. Between Sir *John Heathcote* and Sir *John Fleet*. 2 *Vern.* 442.

A Bill lies to diſcover the Owner of a Wharf, to enable the Plaintiff to bring an Action at Law.

A Bill was brought, to diſcover who was Tenant of the Freehold, in Order to bring a *Formedon*; to which there was a Demurrer, and it was allowed. *Hillary* 1683, between *Stapleton* and *Sherrard*. 1 *Vern.* 212; though the Caſe of *Bickerton* and *Bickerton* was quoted to the contrary. *Vide Cary*, 22, where it is ſaid, that ſuch Bills have been frequent.

To diſcover who was Tenant to a Freehold, in order to bring a *Formedon*, not allowed.

A De-

Nor a Tenant to a *Præcipe* on a voluntary Conveyance. *Sed. Quær.*

A Demurrer to a Bill, brought to diſcover the Tenant, to a *Præcipe*, on a voluntary Conveyance, allowed. *Mich.* 1684, between *Sherburn* and *Clark*. 1 *Vern.* 273. 1 *Vern. S. P. per* Lord Keeper, who ſaid, that there were Ways of knowing it without.

A Bill may be for the Diſcovery of the Teſtator's perſonal Eſtate, before the Will is proved.

The Plaintiff's Bill was for a Diſcovery of a perſonal Eſtate, that was deviſed to Charities, relating to the College of, *&c.* the Defendant pleaded that the Will was not yet proved, but was controverted in the Spiritual Court; but the Court over-ruled the Plea, a Diſcovery of the Eſtate being for the Benefit of Perſons intereſted therein, and neceſſary for the Preſervation thereof. *Paſch.* 1688, between *Dulwich* College and *Johnſon*. 2 *Vern.* 49. 1 *Vern.* 106. *S. P. Accord*, where the Right of Adminiſtration was conteſted.

Of the Perſons for whom and againſt whom, a Diſcovery will be admitted.

As to the Difference of the Perſons for whom, and againſt whom a Diſcovery will be admitted, it is to be obſerved, that Perſons who claim Lands by a Will, or any other voluntary Diſpoſition, having the Law on their Side, are entitled, as againſt an Heir at Law, to a Diſcovery in Equity, of Deeds relating to the Eſtate, and to have them delivered up; otherwiſe the Heir might defend himſelf at Law, by ſetting up prior

prior Incumbrances; and by that Means prevent the trying the Validity of the Will. See *Treatiſe of Equity*, 129.

So where a Will, concerning a perſonal Eſtate, is proved in the Spiritual Court; another having a former Will in his Favour may bring his Bill, to diſcover by what Means the latter Will was obtained, and to have an Account of the perſonal Eſtate, and whether the Teſtator was not incapable and impoſed on, though objected by the other Party, that it belonged to the Spiritual Court only, to prove the Validity of the Will, and that the former Will was not proved, in the Spiritual Court, as the Will in his Favour was. *Ibidem.* Ibidem.

But if a Bill is brought by a remote Heir, for a Diſcovery of a Title and Evidence, and to have Terms removed, and the Title at Law cleared, this is one of the hard Caſes at Law, where Equity will not aſſiſt; for as Equity will not relieve the Children, ſhould the remote Heir recover, ſo neither will it aſſiſt the remote Heir. *Ibidem.* Ibidem.

And Purchaſers ſhall not diſcover, to impeach or weaken their Title; for by this Method all Purchaſes might be blown up. As whether in a Mortgage, made by *A.* to *B.* which had been aſſigned to the Defendant; there was not ſome Truſt declared, for the Benefit Not againſt a Purchaſer.

fit of the Plaintiff, though Plaintiff charged in his Bill that ſuch a Leaſe in Defendant's Cuſtody mentioned it; for this is but a Side Wind, to make a Purchaſer expoſe his Title; and the Court will not do it, unleſs the Plaintiff makes ſome Proof towards falſifying his Anſwer, to induce them to it. *Treatiſe of Equity*, 129.

Aſſignee of a Leaſe not forced to diſcover if it be expired.

So an Aſſignee of a Leaſe ſhall not be forced to diſcover, whether the Leaſe was expired. *Ibidem.*

The Court will not help a Man to Evidence, to evict a Poſſeſſion.

So there is no Reaſon to compel one, whoſe Lands lie contiguous to mine, to diſcover the Boundaries in his Deeds; for that would be to help a Man to Evidence, to evict another of his Poſſeſſion. And they will never help the Iſſue againſt a Purchaſer. But where it is a Bounty, as a voluntary Deviſe to the Wife for Life, in ſuch Caſe, the Heir having a good Title, *viz.* as Heir in Tail, to his Great-grandfather, or the like, ſhall be aided. *Ibidem*, 130.

Nor help the Iſſue againſt a Purchaſer, tho' they will help the Heir againſt a Bounty.

A Bill to diſcover a Deed, againſt a Mortgagee or Jointreſs, whereby the Plaintiff would defeat their Title, ſhall never have a Diſcovery but on confirming the Title.

So if a Bill is brought by an Heir at Law, or any other Perſon, againſt a Mortgagee, or Jointreſs, whereby the Party would avoid the Jointure, or Mortgage, under Pretence his Anceſtor was but Tenant for Life, and if he ſeeks for a Diſcovery of Deeds and Writings, to avoid the Title of the Mortgagee,

gagee, or Jointreſs, he ſhall never have ſuch a Diſcovery, unleſs he by his Bill ſubmits to confirm the Title, and then he ſhall.

Nor ſhall an Heir at Law be obliged to diſcover his Deeds, on a Bill againſt him by the Jointreſs, if by Anſwer he ſubmits to confirm her Jointure.

And if a Jointreſs prays a Diſcovery, againſt an Heir at Law, of Deeds and Writings; if the Heir at Law ſubmits to anſwer, to confirm the Jointreſs's Title, ſhe ſhall have no ſuch Diſcovery. See Lord Chief Baron *Gilbert*'s Manuſcript *Hiſtory of the Court of* Chancery, under Title *Revivor*.

Of the Difference between negociable Contracts and others.

But with Reſpect to the perſonal Eſtate, there is Difference between Contracts that are negotiable, and ſuch as are not, or where they are not negotiated in a mercantile Way, and where the Note paſſes as ready Money. As if it were aſſigned as a collateral Security, for a Debt already contracted; for there, if the Note was fraudulently obtained, or by Gaming, he has no Remedy againſt the Drawer. But if he actually negotiates it for Value, the Indorſee ſhall in all Events, have his Money of the Drawer, though he has paid it before, or it was obtained by Fraud; becauſe the Indorſee has a legal Right to the Note, and a legal Remedy at Law, which the Court of Equity ought not to take away from him, and it would be to the Ruin of all Commerce, if the original Cauſe, and Conſideration

of

of ſuch Note, ſhould be enquired into. *Treatiſe of Equity*, 130.

Aſſignee of a Choſe in Action, has no Remedy at Law.

But the Aſſignee of a Choſe in Action has no Remedy at Law, or Right to ſue in his own Name, and has only an equitable Remedy: And this fails, when the Bond or Covenant is obtained by Fraud, or the Obligor has a legal Diſcharge, as a Releaſe upon Payment of the Money. So, if the Bond were aſſigned for Value before Payment, there an equitable Intereſt paſſes; and in ſuch Caſe, if the Obligor pays the Money to the Obligee, and cannot plead ſuch Payment at Law, a Court of Equity will not interpoſe to aſſiſt him. But if he can, Equity will not interpoſe to aſſiſt the Aſſignee. *Ibidem.*

No one is bound to diſcover Matters, which ſubject him to Penalties or Forfeitures.

In the Civil Law, the Oath was only to be tendered in Civil Matters, when the Facts and Circumſtances may render the Uſe of an Oath juſt and decent, and not in criminal Matters, any more than in the Law of *England*. And it is a ſtanding Rule in Equity, that no one is bound to betray himſelf; for it is the Buſineſs of Courts of Equity, to relieve againſt, not to aſſiſt, Forfeitures; and by Law, no one is bound to diſcover any Matters which tend to ſubject himſelf to Penalties or Forfeitures, as a penal Clauſe in an Act of Parliament, or in a Deed, though ſaid it was not a Penalty,

nalty, but Part of the Contract. But otherwiſe, if he covenants not to plead or demur to any Bill, which ſhould be brought againſt him in Equity, or the Plaintiff waives the Penalty. And ſuch Pleas ought to have the greateſt Strictneſs and Exactneſs, as tend to the Support of wrong doing. *Treatiſe of Equity*, 130, 131. —See Title *Anſwer*, &c.

A Bill in ſome Caſes proper to diſcover a Treſpaſs.

And in ſome Caſes, even for a Treſpaſs, a Bill is proper enough in this Court, *viz.* where, by the ſecret Contrivance of it, it cannot eaſily be proved. As if a Man, in his own Ground, digs a Way under Ground to my Mineral, and the like. So in Caſe of a Bill by the *Eaſt India* Company, for a Diſcovery, and to prevent an Interloper's trading to the *Eaſt Indies*, there is a great Difficulty as to the Proof, the Matter, for the greateſt Part, having been tranſacted in the *Eaſt Indies*; and therefore the Plaintiffs ſetting forth, that they were willing to waive the Forfeiture, ſhall have a Diſcovery. *Ibidem*, 131.

And the Defendant ſhall be compelled to diſcover the Charge, though it make him a Treſpaſſer.

So, where the Charge is not by Way of Treſpaſs, but under Colour of Title, as, that the Defendant, by Colour of Sequeſtration by the Committee, had ſeized ſeveral Tythes, &c. due to the Plaintiff, the Plaintiff may pray a Diſcovery of the Particulars ſo taken, and their Value. So, where a Man, by Colour

lour of a Title, enters into an Houſe, *&c.* and poſſeſſes himſelf of the Goods, *&c.* for it may be impoſſible for the Plaintiff to diſcover the Particulars, without ſuch Bill. So, where a Will is proved, and the precedent Adminiſtration revoked, ſuch Bill is uſually neceſſary for the Diſcovery of the Goods; and yet, in Strictneſs of Law, there was a Treſpaſs. *Treatiſe of Equity*, 130.

A Merchant may be obliged to diſcover Goods, the Cuſtoms of them being concealed, if the Attorney-General will not proſecute for the Forfeiture.

A Bill was exhibited by the Attorney-General in the *Exchequer*, wherein it was charged, that the Defendant, being a Merchant, had concealed the Cuſtom of two hundred and ninety Caſks of Currants, and for the better affecting thereof, had given forty Pounds a-piece to two Cuſtom-houſe Officers, and Relief and Diſcovery prayed; but upon a Demurrer it was doubted, whether the Defendant ſhould be bound to diſcover. *Hard.* 173, *Hard.* 201, *S. P.* adjourned, where it was alledged, the Attorney General would not proſecute for the Forfeiture, but for the Duty only.

Not obliged to diſcover Matter, which would ſubject a Perſon to a Forfeiture of his Eſtate.

If a Bill be exhibited, to diſcover whether a Woman be married, or not, and Marriage would be Forfeiture of her Eſtate, ſhe is not obliged to diſcover. Such a Bill diſmiſſed, 24 *Car.* 2*d.* between *Monnins* and *Monnins.* 2 *Ch. Rep.* 86. See the aforeſaid Caſe of Lord and Lady *Howth*, in *Chancery*, Title *Anſwer*, *&c.*

If

Huſband not obliged to diſcover hard Uſage to his Wife.

If a Bill be brought to eſtabliſh an Agreement for a ſeparate Maintenance, and the Wife ſeeks a Diſcovery of hard Uſage, the Huſband may demur to that Part, and it will be allowed. *Mich.* 1682, between *Hinks* and *Nelthorp.* 1 *Vern.* 204.

Defendant may demur, if the Bill be to diſcover what would ſubject him to a Penalty or Forfeiture.

The Bill was to diſcover whether the Defendant had not aſſigned over a Leaſe; the Defendant pleads, that there was a Proviſo in the Leaſe, that in Caſe he aſſigned over, the Leaſe ſhould be void; and that this being in the Nature of a Penalty, or Forfeiture, he ought not to be compelled, in a Court of Equity, to diſcover. For the Plaintiff it was ſaid, that this was not a Penalty, but Part of the Contract; yet the Plea was allowed. *Hill.* 1700, between *Fane* and *Atlee.* *Bac. Equ. Ca.* 77.

If the Bill prays no Relief, it cannot be diſmiſſed on Hearing; it muſt be ſtruck out of the Paper.

The Cauſe being brought to a Hearing, where the Bill was for Diſcovery only, the Queſtion was, whether the Bill ſhould be diſmiſſed, or the Cauſe ſtruck out of the Paper? And the Cauſe was ordered to be ſtruck out; becauſe the Bill is never diſmiſſed, where the Plaintiff prays no Relief; for the Words of a Diſmiſſion are, *The Court ſeeing no Cauſe to relieve, &c. Moſeley's Rep.* 185.

Bills for Diſcovery of Ter-tenants, in Order to bring a *Scire Facias*.

Bills are ſometimes brought in this Court, to diſcover the Heir and Ter-tenants of Lands, in Order to bring a *Scire Facias* againſt them, to revive Judgments: But note, it is ſaid, that the Bill need not require a Diſcovery of any of the Tenants, but ſuch as have Freeholds; for that none other are properly Ter-tenants, and they only ſhould be ſerved. And yet it is often practiſed, not only to ſerve ſuch as are Termors for Years, but even every poor Cottier; which is moſt improper, as it may occaſion a moſt unneceſſary Trouble and Expence to them.

Quære, if to ſerve an Ejectment.

But on Ejectments, as it is ſaid, that every Cottier muſt be ſerved, which is a great Grievance, if ſuch a Bill lies in this Caſe, (and there ſeems to be no Reaſon why it ſhould not, as well as in the Caſe of the *Scire Facias* againſt the Heir and Ter-tenants) the Prayer of Diſcovery, as to the Tenants, muſt be more extenſive.

AN AP-

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APPENDIX,

CONTAINING

Some of the STANDING RULES of the Court, which, being either complex, and relating to different Heads, have been inſerted but under one of the Heads; or which, though inſerted, have not been marked as RULES: And alſo, a late Act of Parliament relating to Proceſs for the Poſſeſſion of Lands, which had been overlooked before the WORK was printed, with ſome few Caſes which have been determined ſince.

Abatement and Revivor.

RULE. Bill of Revivor and *Subpœna* to Revive in what Caſes and the Proceedings.

BY the 22d general Rule, in caſe Plaintiff or Defendant die, pending a Suit, *Subpœna* upon a Bill of Revivor is to be of courſe taken out, which being done,

done, after Service and Return of the Proceſs, all the Proceedings in the former Suit ſhall (upon Motion) ſtand revived; and the Cauſe and Parties may thereupon proceed accordingly. *To be between the 4th and 5th Lines in Page 3. But ſee Page 4.*

Affidavits.

RULE. Affidavit to be filed the Day before the Motion thereon.

By the latter Part of the 51ſt general Rule, all Affidavits, Certificates, and Reports, are to be entered, at leaſt, the Day before the Motion is to be made thereon. *To be between the 15th and 16th Lines in Page 54, but ſee Page 800.*

Anſwer, &c.

RULE. The Anſwer when ſworn to be delivered to the Attorney.

By the 21ſt general Rule, after the Defendant hath ſworn his Anſwer, it ſhall not be delivered unto him, but unto his known Attorney, who is to take Care that the ſame be forthwith filed, in the Chief Remembrancer's Office. *To be after the 2d Paragraph, in Page 92.*

RULE. No Anſwer to be deemed filed 'till the Contempt be purged.

By the 24th general Rule, *pars*, no Anſwer ſhall be deemed to be filed, until the Contempt be purged; and until the ſame ſhall be ſo purged, the Plaintiff may proſecute the Contempt, notwithſtanding any Anſwer alledged to have been filed. *See Page 85. 437.*

Attach-

Attachment, Contempt, Coſts, Decree.

By the 71ſt general Rule, in all Attachments for not performing of Decrees, and for Non-payment of Coſts, particular Notice is to be taken in the Body thereof, what it is for, to the End, that the Sheriff may be the more careful and wary in the Execution, or taking Security in ſuch Caſes. *See Page* 371 and 415.

RULE. In Attachments for Coſts and not performing Decrees, Notice to be taken therein what it is for.

Commiſſions to examine.

By the 76th general Rule, The Commiſſioners, *&c. as in the 1ſt Paragraph of Page* 590.

RULE.

Coſts, Diſmiſs.

By the 28th general Rule, if Exceptions be taken to the Draft of a Decree, or Diſmiſs, the Exceptant is to depoſite forty Shillings Coſt; and if they be ruled for him, he is to be repaid the ſame, but if againſt him, the ſaid forty Shillings are to be paid to the other Party. *To be after the 2d Paragraph in Page* 384. *See Page* 407.

Hearing.

By the 45th general Rule, when Witneſſes are examined, the firſt Rule for Publication is to be entered of courſe,

RULE. Publication of the Depoſitions and ſetting down the Cauſe for Hearing.

firſt giving Notice * to the Attorney of the other Side; and if the ſame be entered, or moved on the Eſſoin Day in the precedent Term, and the ſecond Rule moved within ſix Days of the next Term, and thereupon Publication granted, in ſuch Caſe, the Cauſe may be ſet down to be heard in the four Days after *Eaſter* Term, or in the eight Days after any other Term, as the ſame ſhall happen. And all Cauſes are to be ſet down for Hearing, by the Chief Remembrancer, according to Priority of Publication † if no Order of Court to the contrary.

All Cauſes to be ſet down for Hearing according to Priority of Publication.

RULE.
If the Defendant appears not, on the Hearing, on Affidavit of Service of the proper Proceſs, the Court will make a conditional Decree.

By the 40th general Rule, if at the Day of Hearing the Plaintiff be ready, and the Defendant maketh default, Affidavit is to be made of ſerving the Defendant with Proceſs, *ad audiendum Judicium*, and the Court will proceed to Hearing: And after the Plaintiff's Bill is opened, the Defendant's Anſwer is to be read, and the Plaintiff's Proofs; whereupon, the Court will decree or diſmiſs the

* This Part of the Rule has been altered, and the preſent Practice is, as in Page 470 to 474.

† This Part alſo of the Rule has been altered, and the preſent Practice is, as in the aforeſaid Pages: But in the Book of the Court-Rules, in the Chief Remembrancer's Office, there is a Note, that this Method of ſetting down Cauſes according to Priority of Publication, prevented confuſion, the great Arrear of Cauſes too often in this Court, and much Expence to the Suitors.

the Cauſe, or otherwiſe order, as ſhall ſeem fit: But in ſuch Caſe, the Court doth not uſe to make a Decree abſolute, but to give a Day to the Defendant to ſhew what he can againſt confirming the Decree; at which Day, if he does come and endeavour to ſhew Cauſe to ſtay the Decree, and thereupon the Court doth decree, the Defendant, in ſuch Caſe, ſhall pay down forty Shillings,* or more, if the Court think fit, for the Plaintiff's double Attendance by Reaſon of the default of the Defendant. *See Page* 396.

RULE. Hearing where the Defendant does not appear after Service of Proceſs, and conditional Decree.

By the 67th general Rule, where no Counſel appears for the Defendant at the Hearing, and Proceſs hath been duly ſerved, the Defendant's Anſwer is to be read, and if the Court, upon ſuch Hearing, ſhall find Cauſe to decree for the Plaintiff, yet the Defendant ſhall have a Day to ſhew Cauſe againſt the ſame; but before he be admitted he ſhall pay down forty Shillings† Coſt, or ſuch Coſts, as the Court ſhall order, and the Order is to be penned accordingly. *See Page* 396.

* The Coſt to be paid by the Defendant, before he be admitted to ſhew Cauſe againſt a conditional Decree, in this Court now, is five Pounds, and the Defendant ſhould be ſerved with the *Subpœna* to hear Judgment, eight Days at leaſt, before the Day appointed for the Hearing.

† Now five Pounds, as before.

Injunctions on Poſſeſſory Bills, to reſtore, and quiet Poſſeſſions.

RULE. Injunction to quiet, &c. in what Caſes.

By the 62d general Rule, Injunctions to quiet Poſſeſſion will not be granted before hearing the Cauſe, but upon Oath made of an actual Poſſeſſion at the Time of the Bill exhibited in the Plaintiff, or thoſe under whom he claims, and for the Space of three Years before, and alſo upon Satisfaction to the Court out of the Defendant's Anſwer, or by other good Matter, that the Title of the Plaintiff is not determined. But no Injunction without ſpecial Order, and expreſs Words, ought to hinder any Extent or Execution actually upon the Land, or to hinder the Defendant's Proceeding at Common Law to evict the Plaintiff; nor for making any Leaſe, peaceable Entry, or ſingle Diſtreſs for that End. *To be between the 2d and 3d Paragraphs in Page* 310, *but ſee Page* 311. 531. 533.

But not to hinder any Extent, or prevent Entry, &c. without ſpecial Order and expreſs Words.

All Injunctions to be taken out in eight Days.

By the Rules and Practice of this Court, all Injunctions are to be taken out in eight Days, and the Party to be ſerved therewith, and if taken out afterwards, they ſhall be ſet aſide. See the 63d general Rule, pa. 560, and the Caſe of *Geoghegan* againſt *Geoghegan*, in this Court, *Trin.* 1742, where this Matter was ſettled upon full Debate, and on the Motion the Caſe of *Clarke* and *Sheil* was mentioned, as a Caſe, where the ſame Point

Point had been ſo determined in this Court, in the Year 1697, but upon the ſtricteſt Search in the Books of that Year and of ſeveral Years before and after, I could not find it.

Injunction to the Sheriff for the Manſion Houſe, on the firſt Application.

In the Caſe of *Smyth* Guardian of *Prendergaſt* and others againſt *O'Shaghneſſy* and others, in the Court of *Chancery* here, in *October* 1760, on a Petition to the Lords Commiſſioners, (the Lord Chancellor being then in *England*) on a poſſeſſory Bill and Affidavits, an Injunction was granted to the Sheriff, to reſtore the Plaintiff, as Deviſee of the Eſtate in Queſtion, to the Poſſeſſion of the Manſion-Houſe, out of which, it had been ſworn, he had been forced by the Defendant *O'Shaghneſſy*, who claimed under ſome old dormant Title, not as Heir at Law; and an Injunction was alſo granted to the Party, as to the Demeſne, unleſs Cauſe ſhould be ſhewn to the contrary, in the Time preſcribed by the Order; afterwards, in *Michaelmas* Term following, the Defendant came to ſhew Cauſe againſt the Injunction to the Party, and to ſet aſide the Injunction to the Sheriff, upon a Notice for that Purpoſe; but as to the firſt Point, the Court diſallowed the Cauſe. And as to the ſecond Point, the Court refuſed to ſet aſide the Injunction, for that it is an Order of Courſe, and uſually granted at the firſt Inſtance, as the Party is turned out

out of his Place of Reſidence, and may not have a Place to go to; and on theſe Motions the ſeveral following Points were determined;

Affidavits not uſually admitted to be read on the Part of the Defendant on an Application for an Injunction to the Party, and why. And in what Caſes they may.

That the Defendant ſhould not read any Affidavits to contradict the Facts in the Plaintiff's Affidavits, or ſhew any other Cauſe than appeared on the Face of the Plaintiff's Affidavits. And it was urged, by the Counſel for the Plaintiff, that it is the conſtant Courſe, in Courts of Equity here, on theſe Applications, for Injunctions to the Party, not to ſuffer any Affidavits to be read on the Part of the Defendant, but where there is an Inſufficiency, Uncertainty, or Defect, in the Plaintiff's Affidavit; beſides, the Injunction to the Party is but as a Summons, to put the Matter in the Way of Trial. *See before Page* 532, 533.

A Deviſee may count upon the Poſſeſſion of his Deviſor, againſt a Stranger, or Perſon who is not the Heir.

It was alſo determined, that although the Deviſee had been but a few Days in Poſſeſſion, yet he was intitled to be reſtored upon a poſſeſſory Bill, and might take up, and count upon the Poſſeſſion of the Deviſor; as it was not pretended that the Defendant was Heir at Law, nor was the Heir at Law a Party, or any way before the Court.

Affidavit may be read tho' made before the Bill filed.

And upon the firſt Motion, an Objection was made to the reading of the Affidavits, as they had been made before the

the poſſeſſory Bill was filed; which Objection was alſo over-ruled, the Clerks having declared, it had been frequently done. And upon the ſecond Motion, Lord Chancellor declared, he would not go into that Matter, as they had been read upon the firſt Motion, and the Order to ſhew Cauſe being founded on it.

Affidavit read to prove the Will of the Deviſor.

And for the ſame Reaſons, his Lordſhip alſo over-ruled another Objection made by the Defendant's Counſel, as to reading an Affidavit of one of the Witneſſes to the Will, as to the Execution of it. On this laſt Objection, it was urged by the Counſel for the Plaintiff, that the Inconveniencies might be exceeding great to a Deviſee, were he to wait for the proving of the Will; that in the preſent Caſe a Title was ſworn to, and the Deviſes to the Plaintiff in the Will, were ſet out in the Affidavit.

Heir need not be a Party, on a Queſtion between the Deviſee and a Stranger.

An Objection was alſo made, that the Heir at Law was not before the Court; but it was thought of no Weight, for he could not be prejudiced by the preſent Motion.

Deviſee not to count on the Poſſeſſion of his Deviſor againſt the Heir. *Sed, Quær.*

It ſhould ſeem that the Heir is in a better Condition by this Determination, as he has only the Will to combat with, and not *O'Shaghneſſy*'s Title; and that the Deviſee could not have taken up, and counted upon the Poſſeſſion of the Devi-

Deviſor againſt the Heir at Law, had the Queſtion been between them, as he was admitted to do in this Caſe againſt a Stranger, and who claimed under an old Title, and not as Heir at Law. *See before Page* 315.

It is well worth while to read the Regiſter's Notes on this Motion; it held ſeveral Days, and was moſt learnedly debated.

Perſons proclaimed for reſiſting Sheriffs, &c. in the Execution of Proceſs for giving, &c. Poſſeſſions of Lands, guilty of Felony and to be tranſported.

By Stat. 25 *Geo.* 2d. Ch. 12. Sect. 1. If any Perſons ſhall be preſented by the Grand-Jury, at any Aſſizes, or general Quarter Seſſions of the Peace, for having oppoſed, or aided in the oppoſing, the Execution of any Proceſs, for giving or quieting the Poſſeſſion of any Lands, and ſuch Preſentments being returned to the Clerk of the Council; the Perſons in ſuch Preſentment named ſhall, by Proclamation from the Lord Lieutenant, or other Governors and Council, be proclaimed, and in Caſe ſuch Perſons, ſo preſented and proclaimed for having oppoſed, or reſiſted, or aided in the Oppoſing, or reſiſting, the Execution of any ſuch Proceſs, do not, within the Time to be limited in ſuch Proclamation, render themſelves to ſome Juſtice of the Peace, of the County where ſuch Preſentment ſhall be made, they ſhall from thenceforth be convict of Felony, and tranſported to ſome of His Majeſty's Plantations in *America*, as in Caſes of Felony;

Felony; and the Court before whom ſuch Perſons ſhall be brought, ſhall have Power to order ſuch Offenders to be tranſported for ſeven Years; and all Perſons who ſhall knowingly conceal, aid, abet, or ſuccour ſuch Perſons, after the Time they were ſo preſented and proclaimed, ſhall be guilty of Felony, and ſhall be tranſported to ſome of His Majeſty's Plantations in *America*, for the Space of ſeven Years.

The printed Proclamation wherein Perſons are named for oppoſing Execution of Proceſs ſhall be adjudged ſufficient Evidence againſt ſuch Perſons.

And by Sect. 2. the printed Proclamation wherein ſuch Perſons are named, to be preſented by the Grand-Jury of any County, at the general Aſſizes, or Quarter Seſſions, to be guilty of the Offences aforeſaid, ſhall be adjudged a ſufficient Evidence of ſuch Perſon.

Examination ſhall be taken on Oath before a Judge of the King's Bench, &c. before any Grand Jury ſhall preſent Perſons, as aforeſaid.

And by Sect. 3. it is provided, that before any Grand Jury ſhall preſent any Perſons, as aforeſaid, Examinations ſhall be taken before ſome Judge of the *King's Bench*, Judge of Aſſize, or Juſtice of the Peace, upon Oath; which Examination ſhall be lodged with the Clerk of the Crown, or Peace, for the County, or Place where ſuch Perſons ſhall be preſented; and a Copy thereof ſhall be certified, together with the Preſentment to the Chief Governors and Council, before the Perſons, ſo preſented, ſhall be proclaimed.

And

Perſons intitled to Poſſeſſion by Judgment or Decree, to be deemed in actual Poſſeſſion from the Time of ſuch Judgment, &c. where Sheriffs, &c. are oppoſed in the Execution of Proceſs for giving ſuch Poſſeſſion.

And by Sect. 4, when ever a Sheriff, or other Officer duly authorized to execute any Proceſs of the Law, for giving, quieting, or reſtoring of the Poſſeſſion of Lands, ſhall be forcibly reſiſted, and prevented from executing the ſame, every Perſon having Right thereby to be quieted in, or reſtored to, their Poſſeſſions, ſhall, from the Time of ſuch Reſiſtance and Oppoſition, be deemed to be in the actual Poſſeſſion of ſuch Lands, as fully as if the Sheriff, or other Officer, had duly executed the Proceſs, and ſhall be intitled to the Rents, Iſſues, and Profits, from the Time of the giving of the Judgment, or Decree, on which ſuch Proceſs was founded: And the Payment of the Rent for ſuch Lands becoming due from the Time of ſuch Judgment, or Decree, to any other Perſons, ſhall be void. And all Rents accruing out of the ſame, and from the Time of ſuch Judgment, or Decree, are to be the Property of the Perſons intitled to the Poſſeſſion under ſuch Judgment, or Decree. And every Perſon, who ſhall unlawfully keep Poſſeſſion of ſuch Lands, after the Sheriff or other Officer ſhall be prevented from executing ſuch Proceſs, as aforeſaid, ſhall reſpectively forfeit to the Perſons, who ought to have been quieted or reſtored by ſuch Proceſs, double the Value of the Rents of ſuch Lands, &c. from the Time of pronouncing of the Judgment, or

Payment of Rents, &c. from the Time of ſuch Judgment, &c. to any other Perſon void.

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or Decree, on which ſuch Proceſs was founded, to be recovered by Action, *&c.* in any of his Majeſty's Courts, wherein no Eſſoin, *&c.* ſhall be allowed.

And by Sect. 5, this Act ſhall continue five Years, and to the End of the then next Seſſions of Parliament.

The above Act was continued for ſeven Years, from the 1ſt Day of *June*, 1758, and to the End of the then next Seſſion of Parliament, by Stat. 31 *Geo.* 2*d.* Ch. 9. Sect. 9.

Injunctions to ſtop Proceedings at Law.

RULE. Injunction on Time to anſwer a *Dedimus*.

By the 17th General Rule *pars*, where a *Dedimus* is prayed, to take an Anſwer in the Country, or beyond Seas, an Injunction will be granted, by taking out an Order of courſe, to ſtay the Defendant's Suit at Law (if any be) till the Anſwer come in *. *To be between the 1ſt and 2d Paragraph in Page* 549. *See Page* 75, 76.

Proceſs

* The general Rule is, that if a Defendant prays a *Dedimus*, the Plaintiff ſhall enter a Rule of Courſe for an Injunction: But in ſome ſpecial Caſes, the Court has granted the Defendant a *Dedimus*, without an Injunction; as where a Bill is brought againſt a Suit at Law, and the Plaintiff at Law is ready for a Trial before the Bill is filed, or Injunction prayed, in that Caſe, the Court will not grant an Injunction, till after Verdict.

Proceſs of Contempt.

No Anſwer to be deemed filed, until the Coſt of Proceſs is paid.

By the 24th General Rule *pars*, no Anſwer ſhall be deemed to be filed, until the Contempt be purged; and until the ſame ſhall be ſo purged, the Plaintiff may proſecute the Contempt, notwithſtanding any Anſwer alledged to have been filed. *See the ſecond Paragraph in Page* 790.

Sequeſtration and Sequeſtrators.

Sequeſtrators to be paid for their Trouble, and what.

In the Caſe of the Attorney-General againſt *Carden* and others, on a Hearing in this Court, in *Trinity* Term, 1760, a Queſtion aroſe, If Sequeſtrators are intitled to be paid for their Trouble; and Counſellor *Roberts*, whoſe Father had been Deputy Chief Remembrancer for many Years, and who had himſelf acted in the ſame Office for ſeveral Years, informed the Court, that his Father and himſelf had generally allowed the Sequeſtrators one Shilling in the Pound for what they had received, including Expences; but that theſe Allowances have been varied, according to Circumſtances. See the Caſe of *Watkins* and *Morriſon* on this Point, which has been depending ſeveral Years in this Court, and is not yet determined. I don't find, that in the Court of *Chancery* there is any ſettled Poundage, or other Conſideration, for their Receipt; or

or, that either they, or a Receiver (if appointed) are allowed any Thing for their Receipt or Trouble, unleſs there be an Order of the Court for the Purpoſe. By the Civil Law from whence this Proceſs (it is ſaid) was taken up by Courts of Equity, they were allowed both Sallary and Expences. *See Pages* 778, 779. *Note*, this Cauſe is alſo before mentioned in Page 6, to ſhew the Preference which is to be given in this Court to the King's Buſineſs. But for more on this laſt Matter, ſee 4 *Inſt.* 109. and the Oath taken by the Barons.

A Sequeſtration is the firſt Proceſs againſt a Peer, and upon a ſpecial Contempt the Sequeſtration ſhall iſſue immediately; but where it is for Want of an Anſwer, it is ſaid, that the Sequeſtration is to iſſue only in ſuch Time as it might iſſue againſt a Perſon not intitled to Privilege, and it ſeems reaſonable that it ſhould ſo iſſue immediately againſt a Peer upon a ſpecial Contempt, on Account of the great Advantage he hath, in this Caſe, over every other Perſon; for on a ſpecial Contempt, an Attachment ſhall iſſue even againſt a Member of the Houſe of Commons, if Privilege be not in, and he ſhall be taken into Cuſtody. See 1 *Peere Williams* 535. 2 *Peere Williams* 102. 385. and ſee the Caſe of *Bourke* againſt Lord *Liſle*, in the *Chancery* here, *Michaelmas* Term 1760: But in this Caſe, the Sequeſtration, though awarded,

A Sequeſtration the firſt Proceſs againſt a Peer, and on a ſpecial Contempt it is to iſſue immediately.

was not to be taken out without further Order, the Counſel for the Plaintiff agreeing thereto.

Tithes.

Note, the Bill which was prepared laſt Seſſions of Parliament, for recovering *Tithes* by *Civil Bill*, and which is mentioned in Page 234, did not paſs into a Law.

The Author hopes and requeſts his Readers will excuſe the too many Errata *of the Preſs, and Mis-ſtoppings, which may appear throughout this Work. He was much preſſed to publiſh it, and beſides the Multiplicity of Buſineſs he has for private Perſons, he has the Honour of holding four different Employments, under his Majeſty, to wit,* Solicitor for the King's Rents, Solicitor for the forfeited Eſtates, Solicitor for the Caſual Revenue, and Clerk of the Informations in *Dublin* Port; *is alſo Regiſter to the Commiſſioners for opening the Paſſages,* &c. *Theſe prevented his Superviſing the Preſs, whilſt the Work was printing; and he could only ſince, give it a curſory Reading; beſides, he did not think his Attendance therein ſo abſolutely neceſſary, as he had taken great Pains with the Copy; but he has endeavoured to point out on the Back of the Title Page, to the firſt Volume, ſuch Miſtakes as are moſt material, and intreats that his Readers will correct them in the ſeveral Pages in which they are. He has paſſed by ſeveral ſmall Errors in Letters and Stoppings, which any Reader of the meaneſt Capacity may eaſily diſcover.*

A LIST

A

LIST

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Note,

Note, The following Caſe having happened ſince the Appendix and Part of the Index were printed, and being ſpecial, it is thought proper to incert it here.

How to proceed againſt Infants who neglect to appear upon Service of Proceſs.

IN the Caſe of the Attorney General and others againſt *Redmond* and *Anne Dillon*, who were Minors under the Age of fourteen Years, and had no Guardian teſtamentary, or otherwiſe, (as appeared by Affidavit) being ſerved with a *Subpœna* upon an Information, neglected to appear, on which, Attachments were entered againſt them in the uſual Manner directed to the Sheriff, and then a Motion was made, that the Tipſtaff of the Court, or the Purſuivant, might be ordered to bring the Defendants the Minors up to Court, that a Guardian might be aſſigned for them, to appear and anſwer; but as it appeared that the Defendants were not yet in Cuſtody of the Sheriff to whom the Proceſs was directed, the Court would make no Rule as to bringing up the Minors, but on Application of Counſel, ordered the Proceſs to be changed to the County where the Defendants lived; but it was mentioned by ſome of the old Practitioners of the Court, that the uſual Way is, to carry on the Proceſs to a Serjeant at

at Arms, or to apply for an Order that the Proceſs may be directed to the Purſuivant of the Court, as the Serjeant at Arms and Purſuivant are more immediately the Officers of the Court; but that in the latter Caſe, a *Non eſt Inventus* muſt be firſt returned, on the firſt Attachment, to the Sheriff. In the Court of *Chancery*, the Proceſs in theſe Caſes is always carried on to the Serjeant at Arms; but the Purſuivant of that Court can execute his Proceſs but within ten Miles of the City of *Dublin*, unleſs upon ſpecial Contempts. See Page 755, 756, where it is ſaid the Sheriff, on ſuch an Attachment, is not obliged to bring up his Priſoner to Court, unleſs there be a ſpecial Order for the Purpoſe.

FH
MVSEVM
BRITANNICVM

FINIS.

ERRATA in Words and Letters.

EXPLANATION.

P. ſtands for *Page*, f. for *for*; l. for *Line*; r. for *read*; d. for *dele*; and i. for *inſert*.

P. 11 f. *pedente* r. *pendente*, l. 9. p. 23 f. *too* r. *to*, l. 6. p. 36 f. *Summons* r. *Summon*, l. 26, *that* omitted, l. 34. p. 82 f. *Paret* in the marginal Note r. *Parte*, and add *y* to the *b* in the Note at bottom. p. 74 f. *Commiſſioners* r. *Commiſſions*, l. 6. p. 110 f. *declinatory* r. *dilatory*, l. 27. p. 112 f. *ſeems* r. *ſeeks* in Margin. p. 120 i. 138 after 137, l. 27. p. 144 f. *Buck* r. *Burke* laſt line. p. 182 f. *tranſacted* r. *transferred*, l. 4. p. 196 f. *Parties* r. *Party's*, l. 15. p. 224 f. *Legatees* r. *Legatee*, l. 9. p. 275 f. 1748 r. 1743, l. 8. p 306 307 d. *Parentheſis*. p. 310 f. *Vendicat.* r. *Vendicatione*, l. 5. p. 314 f. *Priority* r. *Privity*, l 3. p. 316 f. *the* r. *this*, l. 15. p. 332 f. *infinie* r. *infinite*, l. 16. p. 337 f. *for* r. *by*, in marginal Note. p. 344 f. *Law* r. *Laws*, l. 9. p. 359 i. *be* in laſt Line but one. p. 360 f. *it* r. *he*, l. 13. p. 378 f. *brough* r. *brought*, l. 8. p. 384 f. *Circumſtance* r. *Circumſtances*, in the Note at the bottom. p. 390 f. *reqiſitionem* r. *requiſitionem*, l. 18. p. 408 d. *to*, l. 13. p. 436 f. *Counſe* r. *Counſel*, l. 1. p. 475 f. 401 r. 478, l. 9. p. 482 f. *Contumacia* r. *Contumax*, l. 3, and at the End of the Paragraph, i. pars 6 *de contumacia*, 32. p. 535 f. *Defendant* r. *Plaintiff* in Margin. p. 540 f. *Revolutions have* r. *Reſolutions having*, l. 24, p. 544 f. *and* r. *to the*, l. 19. p. 547 f. 52 r. 59, l. 12. p. 550 i. *otherwiſe* before the Word *the*, l. 21. p. 575 f. *Examiners* r. *Examinations*, l. 9. p. 585 f. *Commiſſioner* r. *Commiſſion*, l. 12. p. 598 i. *to* l. 13. p. 633 i. *if*, l. 21. p. 667 f. *ſo* r. *or*, l. 20. p. 676 f. *Commiſſion* r. *Petition*, in Margin. p. 736 f. *not* r. *no*, l. 26. p. 775 f. *Sequeſtration* r. *Sequeſtrators*, l. 30. p. 780 f. *municipipal* r. *municipal* in the Note. p. 781 f. *Cuſtodium* r. *Cuſtodiam*, l. 1. p. 783 f. *revive* r. *renew*, l. 28. p. 797 f. *Proofs* r. *Proceſs*, in Margin. p. 860 f. 812 r. 869, l. 9. p. 883 d. *is*, l. 13. p. 884 i. *not* before *only*, in fifth Line of the Notes.

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